THE SAUDI ARBITRATION LAW 2012 ASSESSED AGAINST THE CORE PRINCIPLES OF MODERN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE STUDY WITH THE MODEL LAW AND SCOTS LAW

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ABSTRACT

Following the Aramco arbitration in 1963, Saudi Arabia's approach to international arbitration resulted in a reputation for being an arbitration unfriendly country. This was addressed to some extent by the Arbitration Law of 1983. However, arbitration under the 1983 law remained dependent on the approval of the national courts. With too much scope for judicial intervention, the legal framework undermined the final and binding nature of the award, constrained party autonomy and created inefficient delays. In 2012, a new Law of Arbitration was passed to replace the 1983 law with a legal framework intending to meet the needs of international commercial parties. The question addressed by this thesis is whether the Arbitration Law of 2012 (SAL 2012) succeeds in creating a legal framework that is consistent with the three core principles that provide the foundations for modern international commercial arbitration. These core principles of party autonomy, procedural justice and cost-effectiveness were used as normative tools for assessing the provisions of the SAL 2012, which were based on the UNCITRAL Model Law. Relying on those principles, the SAL 2012 was subjected to a comparative legal analysis, using the Model Law and the Arbitration (Scotland) Act 2010 as comparators. Although hampered by a lack of available case law involving the SAL 2012, the analysis concluded that the SAL 2012 is a very significant development, providing a legal framework that facilitates arbitration, encourages a pro-arbitration culture and achieves a balance between the three core principles that should meet the needs of international commercial parties. Despite this, the law could be further reformed to make Saudi Arabia even more attractive as a location for arbitration. While acknowledging that future reform should be guided by empirical research on arbitration in Saudi Arabia, proposals were made for the further development of a pro-arbitration legal framework.

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Table of Legislation and Conventions

Kingdom of Saudi Arabia

Arbitration Law 1983, Royal Decree No. M/46.

Arbitration Law 2012, Royal Decree No. M/34.

Basic Law of Governance 1992, Royal Decree No. A/90.

The Board of Grievances Regulation 1983, Royal Decree No. M/51.

Cabinet Decree No. 257 of 2014.

Civil Procedures Law 2013, Royal Decree No. M/1.

Enforcement Law 2012, Royal Decree No. M/53.

Implementation Rules 1985, Royal Decree No. M/7/2021.

Implementation Regulation of the Arbitration Law 2017, Resolution No. 541.

Law of the Council of Minister 1993 Royal Decree No. A/13.

The United Kingdom

Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

Requirements of Writing (Scotland) Act 1995.

Arbitration Act 1996.

Contracts (Rights of Third Parties) Act 1999.

Mental Capacity Act 2005.

Arbitration (Scotland) Act 2010.

Schedule 1 (Scottish Arbitration Rules).

Contract (Third Party Rights) (Scotland) Act 2017

Other Legislation and Conventions

Arbitration and Conciliation Act 1996 (India).

Arbitration and Conciliation (Amendment) Act 2015 (India).

Convention of the Arab League on the Enforcement of Judgments 1952.

European Convention on Human Rights (ECHR) 1952.

Federal Arbitration Act, Title 9, US Code Chapter 1, 1925.

Federal Civil Procedures Law 1992 (UAE).

Geneva Protocol on Arbitration Clauses 1923.

Geneva Convention on the Execution of Foreign Arbitral Awards 1927.

Hong Kong Arbitration Ordinance (Cap 609) 2011.

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

Swedish Arbitration Act 1999.

UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended 2006).

Table of Cases

Model Law Jurisdictions

CLOUT case No 566, *ABC Co v XYZ Ltd* [2003] 3 SLR 546 (Singapore).

Ace Bermuda Insurance Ltd v Allianz Insurance Company of Canada [2005] ABQB 975 (Alberta QB, Canada).

Achilles (USA) v Plastics Dura Plastics Itee Ltd [2006] QCCA 1523 (Quebec CA, Canada).

Acorn Farms Ltd v Schnuriger [2003] 3 NZLR 121 (New Zealand).

Agrawest &AWI v BMA [2005] PESCTD 36 (Canada).

AJU v AJT [2011] SGCA 41 (Singapore).

Alenco Inc v Niska Gas Storage US, LLC [2009] ABQB 192 (Alberta QB, Canada).

CLOUT case No 740, *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR 174 (Singapore).

CLOUT case No 207, Arb no 6 of 1996, 6 February 1998, Singapore International Arbitration Centre.

Attorney-General v Tozer (No 3), High Court, Auckland, New Zealand, 2 September 2003, M1528-IM02 CP607/97.

AQZ v ARA [2015] SGHC 49 (Singapore).

Bayerisches Oberstes Landesgericht, Germany, 4 Z Sch 02/99, 29 September 1999.

CLOUT case No 375, Bayerisches Oberstes Landesgericht, Germany, 4 Z Sch 23/99, 15 December 1999.

Bayview Irrigation District #11 v United Mexican States (2008) CanLII 22120, [13-14] (Ontario SC, Canada).

Bundesgerischtshof, Germany III ZR 265/03, 13 January 2005.

Bundesgerichtshof, Germany, VII ZR 105/06, 25 January 2007.

Burlington Northern Railroad Co v Canadian National Railway Co (1995) 20 BLR (2d) 145 (BC CA).

Burlington Northern Railroad Co v Canadian National Railway Co [1997] 1 SCR 5 (SC, Canada).

Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd [2009] HKCFI 94 (Hong Kong).

Canadian Ground Water Association v Canadian Geoexchange Coalition [2010] QCCS 2597 (QC SC, Canada).

China Merchants Heavy Industry Co Ltd v JGC Corporation [2001] HKCA 248.

China Ocean Shipping Co Owners of the M/V Fu Ning Hai v Whistler International Ltd Charters of the M/V Fu Ning Hai [1999] HKCFI 693 (HC, Hong Kong).

CLOUT case No 76, *China Nanhai Oil Joint Service Corporation, Shenzhen Branch v Gee Tai Holdings Co Ltd* [1994] 3 HKC 375; [1995] HKLR 215; [1995] ADRLJ 127 (Hong Kong)

CJSC Russian Telephone Company v Sony Ericsson Mobile Telecommunications Rus LLC, Supreme Arbitration Court of the Russian Federation, 19 June 2012.

Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192 [218ff] (FC, Australia).

Compagnie Nationale Air France v Mbaye [2003] CanLII 35834 (QC CA, Canada).

Corporation Transnacional de Inversiones, SA de CV v STET (1999) 45 OR (3d) 183; (1999) CanLII 14819, (Ontario SC, Canada).

CLOUT case No 968, Coruña Provincial High Court, Spain, Section 6, Case No 241/2006, 27 June 2006.

CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK [2011] SGCA 3 (Singapore).

CLOUT case No 13, *Deco Automotive Inc v GPA Gesellschaft für Pressenautomation mbH*, 27 October 1989 (ON District Court, Canada).

Desbois v AC Davie Industries inc [1990] CanlII 3619 (Quebec CA, Canada).

Electra Air Conditioning BV v Seeley International Pty Ltd [2008] FCAFC 169, [35] (Australia).

CLOUT case No 366, *Europcar Italia SpA v Alba Tours International Inc,* (1997) 23 OTC 376 (Canada).

CLOUT case No 351, *Food Services of America Inc v Pan Pacific Specialties Ltd* (1997) 32 BCLR (3d) 225 (BC SC, Canada).

Front Carriers v Atlantic & Orient Shipping Corp [2006] 3 SLR 854 (HC, Singapore).

Fung Sang Trading Ltd v Kai Sun Products & Food Co Ltd [1991] HKCFI 190 (Hong Kong).

Gordian Runoff Ltd v Westport Insurance Corporation [2010] NSWCA 57 (Australia).

Government of the Republic of the Philippines v Philippine International Air Terminals Co Inc [2007] 1 SLR (R) 278; [2006] SGHC 206 (HC, Singapore).

Grandeur Electrical Co Ltd v Cheung Kee Fung Cheung Construction Co Ltd [2006] HKCA 305.

CLOUT case No 569, Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 01/01, 8 June 2001.

Hanseatisches Oberlandesgericht Hamburg, Germany, 9 Sch 01/05, 12 July 2005.

H & H Marine Engine Service Ltd v Volvo Penta of the Americas Inc [2009] BCSC 1389 (Canada).

Gay Constructions Pty Ltd v Caledonian Techmore (Building) Limited [1994] HKCFI 171, [13] (Hong Kong).

H Smal Ltd v Goldroyce Garment Ltd [1994] HKCFI 203 (Hong Kong).

ICAC International Consultech v Silverman (1991) CanLII 2868 (Quebec CA, Canada).

Impex Corporation v Elenjikal Aquamarine Exports Ltd AIR (2008) Ker 199.

Indian Oil Corporation Ltd v Atv Projects India Ltd (2004) DLT 701 (Delhi HC, India).

Inforica Inc v CGI Information Systems and Management Consultants Inc (2009) ONCA 642 (Canada).

Jagdish Chander v Ramesh Chander (2007) 5 SCC 719 (India).

Jean Estate v Wires Jolley LLP [2009] ONCA 339 [95-97]; CLOUT case No 1044 (ON CA, Canada).

Jung Science Information Technology Co Ltd v ZTE Corporation [2008] HKCFI 606 (Hong Kong).

Kammergericht Berlin, Germany, 28 Sch 24/99, 22 March 2000.

Kammergericht Berlin, Germany, 20 Sch 07/04, 10 August 2006.

Louis Dreyfus SAS v Holding Tusculum BV [2008] QCCS 5903 (Canada).

Mariana Maritime SA v Stella Jones Inc [2002] FCA 215 (Canada).

Methanex Motunui Ltd v Spellman [2004] 3 NZLR 454, [105] (CA, New Zealand).

Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush and another [2004]

SGHC 26, [2004] 2 SLR(R) 14 (HC, Singapore).

Moohan v S & R Motors (Donegal) Ltd [2009] IEHC 391 (Ireland).

MMTC Ltd v Sterlite Industries (India) Ltd (1996) 6 SCC 716 (India).

Montpelier Reinsurance Ltd v Manufacturers Property & Casualty Ltd [2008] SC (Bda) 27 Com (Bermuda).

M/S Anuptech Equipments Private v M/S Ganpati Co-Op Housing (1999) BomCR 331 (Bombay HC, India).

M/S Prime Telesystem Limited v Sasken Communication Technologies Ltd, High Court of Delhi India, 18 December 2009, OMP 35/2008 [2009] INDLHTC 5430.

Mvungo v Rosiello [2006] eKLR (High Court, Kenya).

Nanhai West Shipping Co v Honk Kong United Dockyards Ltd [1996] 2 HKC 639 (HC, Hong Kong).

Ng Chin Siau v How Kim Chuan [2007] 2 SLR 789; [2007] SGHC 31, [26] (HC, Singapore).

Nikiforos v Petropoulos [2007] QCCS 3144 [31] (QC SC, Canada).

Noble China Inc v Lei Kat Cheong (1998) 42 OR (3d) 69 (ON SC, Canada).

Noble Resources Pte Ltd v China Sea Grains and Oils Industry Co Ltd [2006] HKCFI 334 (Hong Kong).

Oberlandesgericht Frankfurt aM, Germany, 3 Sch 01/99, 28 June 1999.

Oberlandesgericht Frankfurt aM, Germany, 20 Sch 01/02, 14 March 2003.

CLOUT case No 442, Oberlandesgericht Köln, Germany, 9 Sch 30/00, 14 September 2000.

Oberlandesgericht Köln, Germany, 9 Sch 27/02, 11 April 2003.

CLOUT case No 1062, Oberlandesgericht Köln, Germany, 9 Sch 22/03, 2 April 2004.

CLOUT case No 665, Oberlandesgericht Naumburg, Germany, 10 Sch 03/01, 19 December 2001.

CLOUT case No 659, Oberlandesgericht Naumburg, Germany, 10 Sch 08/01, 21 February 2002.

Oberlandesgericht München, Germany, 34 Sch 26/08, 22 June 2009, SchiedsVZ 2010, 169.

Oil Basins Ltd v BHP Billiton Ltd [2007] VSCA 255 (Australia).

Pacific International Lines (Pte) Ltd v Tsinlien Metals and Minerals Co (HK) Ltd [1993] 2 HKLR 249 (Hong Kong).

Paklito Investment Limited v Klockner East Asia Limited [1993] 2 HKLR 39, [52-62] (HC, Hong Kong).

Paquito Lima Buton v Rainbow Joy Shipping Ltd Inc [2008] HCCFA 30 (Hong Kong).

Powertech World Wide v Delvin International General Trading LLC (2012) 1 SCC 361 (India).

PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2006] SGCA 41; [2007] 1 SLR(R) 597 (Singapore).

PT Garuda Indonesia v Birgen Air [2002] 1 SLR 393 (CA, Singapore).

PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation, [2010] SGHC 202 (Singapore).

Quintette Coal Limited v Nippon Steel Corp [1991] 1 WWR 219; [1990] BCJ No 2241 (BC CA, Canada).

CLOUT case No 391, *Re Corporación Transnacional de Inversiones, SA de CV v STET International*, SpA, (1999) 45 OR (3d) 183; [1999] CanLII 14819 (ON SC, Canada).

Re Corporación Transnacional de Inversiones SA de CV v STET International SpA (2000) 49 OR (3d) 414 (ON CA, Canada).

CLOUT case No 625, *Relais Nordik Inc v Secunda Marine Services Limited and Anor*, Federal Court, Canada, 12 April 1990.

Resort Condominium v Bolwell, 29 October 1993, (1995) Yearbook Commercial Arbitration XX 628 (QLD SC, Australia).

CLOUT case No 662, Saarländisches Oberlandesgericht, Germany, 4 Sch 02/02, 29 October 2002.

Schreter v Gasmac Inc 7 OR (3d) 608 (ON, Canada).

Shin Satellite Public Co Ltd v Jain Studios Ltd [2006] 2 SCC 628 (India).

Smart Systems Technology Inc v Domotique Secant Inc [2008] QCCA 444 (Canada).

Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR 86; [2007] SGCA 28 (Singapore).

Sulaikha Clay Mines v Alpha Clays (2005) 1 Arb LR 237 (India).

Supreme Court, Austria, 30 June 2010, Docket 7 Ob 111/10i.

Tang Boon Jek Jeffrey v Tan Poh Leng Stanley [2001] 3 SLR 237 (CA, Singapore).

The Gazette, Une division de Southam inc v Rita Blondin [2003] RJQ 2090; [2003] CanLII 33868, [48] (Quebec CA, Canada).

Thorn Security (Hong Kong) Ltd v Cheung Kee Fung Cheung Construction Co Ltd [2004] HKCA 217.

Trustees of Rotoaira Forest Trust v Attorney-General, High Court (Commercial List) [1999] 2 NZLR 452 (New Zealand).

United Mexican States v Metalclad Corp (2001) 89 BCLR (3d) 359; [2001] BCJ No 950 (BC SC, Canada).

Villeneuve v Pelletier [2010] QCCS 320 [44-49] (QC SC, Canada).

Westport Insurance Corporation v Gordian Runoff Ltd [2011] HCA 37 (Australia).

Xerox Canada Ltd v MPI Technologies Inc (2006) CanLII 41006 (Ontario SC, Canada).

CLOUT case No 1009, *Yugraneft Corp v Rexx Management Corp* [2010] SCC 19; [2010] 1 SCR 649 (Canada).

CLOUT case No 267, *Zimbabwe Electricity Supply Commission v Genius Joel Maposa*, Harare High Court, Zimbabwe, 29 March and 9 December 1998.

Scotland

Arbitration Application (No 3 of 2011) [2011] CSOH 164.

Arbitration Application (No 1 of 2013) [2014] CSOH 83.

Arbitration Application (No 2 of 2016) [2017] CSOH 23.

Forbes v Winton (1886) 13 R 465.

Kyle and Carrick District Council v AR Kerr & Sons 1992 SLT 629.

Manchester Associated Mills Ltd v Mitchells & Butler Retail Ltd [2013] CSOH 2.

Re Partners of Dallas McMillan [2015] CSOH 136.

SGL Carbon Fibres Ltd v RBG Ltd [2012] CSOH 19.

Kingdom of Saudi Arabia

Arbitration case, (2015 (1437H)) case no 37165818, Mecca Court of Appeal.

Case no. 269/3/J, (1988 (1409H)), Board of Grievances.

Case no. 32328746, (2012 (1433H)), Riyadh General Court.

Case no. 3389/1434 (2014 (1434H), Riyadh Court of Appeal.

Case no. 361199450 (2015 (1436H)), Mecca Court of Appeal.

Case no. 3783719 (2015 (1436H), Riyadh Court of Appeal.

Implementation of arbitrators' award, (2015 (1437H)) case no 3798925, Mecca Court of Appeal.

Case of nullification of arbitration award, (2015 (1436H)) case no 361279083, Mecca Court of Appeal.

Janoup Al Jazira v Assim Arab Centre for Environmental Consultations (2017 (1438H)) Case no. 38249619, Riyadh Court of Appeal.

Yuksel v Arabian Pipes, Case no. 4151/1/S (2015 (1436H)), Riyadh Administrative Court of Appeal.

England

ABB AG v Hochtief Airport [2006] 2 Lloyd's Rep 1.

Abuja International Hotels Ltd v Meridien SAS [2012] EWHC 87 (Comm).

Adams v Cape [1990] 2 WLR 657; [1990] Ch 433.

Ahmad Al-Naimi v Islamic Press Agency Inc [2000] 1 Lloyd's Rep 522.

Ali Shipping Corporation v Trogir [1999] 1 WLR 314.

Arsonovia Ltd v Cruz City 1 Mauritius Holdings [2011] EWHC 3702 (Comm).

AT&T Corp v Saudi Cable Co [2000] 2 All ER (Comm) 625.

Bank Mellat v Helliniki Techniki SA [1984] 1 QB 291.

Birse Construction Ltd v St David Ltd [1999] BLR 194.

Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2) [1981] 2 Lloyd's Reports 130.

C v D [2007] EWCA Civ 1282.

Cie Europeenne de Cereals SA v Tradax Export SA [1986] 2 Lloyds Rep 301.

Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46; [2011] 1 AC 763; [2010] 3 WLR 1472.

Dimes v Grand Junction Canal (1852) 10 ER 301.

Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc [2001] 1 All ER 514 (Comm).

Dunhill v Burgin [2014] UKSC 18.

Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40.

Geogas SA v Trammo Gas Ltd (The Baleares) [1993] 1 Lloyd's Rep 215.

Groundshire v VHE Construction [2001] 1 BLR 395.

Harvey v Motor Insurers Bureau, Lawtel transcript, 21 December 2011.

Heyman v Darwins Ltd [1942] AC 356.

HMV UK Ltd v Propinvest Friar Partnership [2012] 1 Lloyd's Rep 416.

HOK Sport Limited (Formerly Lobb Partnership Limited) v Aintree Racecourse Company Limited [2002] EWHC 3094.

Imperial Loan Co v Stone [1892] 1 QB 599.

Irvani v Irvani [2000] CLC 477.

Jacobson v Frachon (1928) 138 LT 386.

Jivraj v Hashwani [2011] UKSC 40.

Kanoria v Guinness [2006] 1 Lloyd's Rep 701; [2006] EWCA Civ 222.

Locabail (UK) Ltd v Bayfield Properties [2000] QB 451.

London Underground Limited v Citylink Telecommunications Limited [2007] EWHC 1749.

Lorand Shipping Ltd v Davof Trading (Africa) BV [2014] EWHC 3521 (Comm).

Mackley & Co Ltd v Gosport Marina Ltd [2002] BLR 367.

Minmetals Germany GmbH v Ferco Steel Ltd [1999] CLC 647.

Naimi v Islamic Press Agency Inc [2000] EWCA Civ 17.

Norbrook Laboratories v Tank [2006] EWHC 1055 (Comm).

OAO Northern Shipping Company v Remol Cadores De Marin SL [2007] EWHC 1821 (Comm).

Pittalis v Sherefettin [1986] QB 868.

R v Sussex Justices ex parte McCarthy [1924] 1 KB 256.

Ridge v Baldwin [1963] 2 WLR 935; [1964] AC 40.

Shashoua v Sharma [2009] EWHC 957 (Comm).

Sonatrach Petroleum Corrp v Ferrell International Ltd [2002] 1 All ER (Comm) 627.

Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638.

Sutcliffe v Thackrah [1974] AC 727.

Trave Schiffartsgesellschaft mbH v Ninemia Maritime Corporation [1986] QB 802.

Vale Do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd [2000] 2 Lloyd's Rep 1.

Woolf v Collis Removal Service [1948] 1 KB 11.

Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd [1985] EGLR 14.

Privy Council

Barton v Armstrong [1976] AC 104.

Bay Hotel and Resort Ltd v Cavalier Construction Ltd [2001] UKPC 34.

Cukurova Holdings AS v Sonera Holding BV [2014 UKPC 14; [2014] 1 CLC 643.

Hart v O'Connor [1985] AC 100.

The United States

Affymax v Ortho-McNeil-Janssen Pharmaceuticals 660 F 3d 281, 285 (7th Cir 2011).

Chromalloy Aeroservices v Arab Republic of Egypt 939 F Supp 907 (1996).

Citigroup Global Markets v Bacon 562 F 3d 349 (5th Cir 2009).

Coffee Beanery Ltd v WW LLC 300 F App'x 415, 419 (6th Cir 2008).

Comedy Club Inc v Improv West Assocs 553 F 3d 1277, 1281 (9th Cir 2009).

DaPuzzo v Globalvest Management Company LP 263 F Supp 2d 714 (SDNY 2003).

Frazier v CitiFinancial Corporation 604 F 3d 1313, 1324 (11th Cir 2010).

Hall Street Associates v Mattel, Inc 552 US 576 (2008).

McDonald v Mabee, 243 US 90 (1915).

Medicine Shoppe International v Turner Investments 614 F 3d 485, 489 (8th Cir 2010).

Parsons & Whittemore v Societe Generale De L'Industrie Du Papier (RAKTA) 508 F 2d 969, 973-974 (1974).

Rhode Island v Massachussets 37 US (12 Pct) 657 (1838).

Stolt-Nielsen SA v Animal Feeds International Corporation 548 F 3s 85, 94 (2nd Cir 2008).

Other cases

Consorts Ury v SA des Galeries Lafayette Cass 2e civ, 13 April 1972.

Case C-387/98, *Coreck Maritime GmbH v Handelsveem BV and Others* [2000] ECR I-9362.

Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-03055.

Federal Supreme Court, Switzerland, 16 December 2009, Decision 4A_240/2009, (2011) 30 ASA Bull 457.

French Company of Venezuelan Railroads Case (1905) Ralston's Report 367.

Mavrommatis Palestine Concession Case (*Greece v UK*) (1924) PCIJ A2 60.

Minority Schools in Upper Silesia (1928) PCIJ A 15.

Orinoco Steamship Company (1910) 1 HCR 504.

Pakistan v India (2000) 54 ICJ Reports.

Petroleum Development (Trucial Coast) Ltd v Sheikh of Abu Dhabi (1951) 18 ILR 144.

Ruler of Qatar v International Marine Oil Company Ltd (1957) 20 ILR 534.

Saudi Arabia v Arabian American Oil Company (Aramco) (1963) 27 ILR 117.

Case No T4387-07, *Soyak International Construction & Investment Inc v Hochtief AG*, 31 March 2009, Stockholm, Swedish Supreme Court.

Application No 13427/87, *Stran Greek Refineries and Sratis Andreadis v Greece*, Series A No 301-B; (1995) 19 EHRR 293.

Case No 31737/96, *Suovaniemi v Finland*, 23 Feb 1999.

Tehran Court of Appeal (Chamber 15), Judgment 559, 19 July 2005.

Abbreviations and Acronyms

English Act	English Arbitration Act 1996
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FAA	Federal Arbitration Act
GCC	Gulf Cooperation Council
ICC	International Chamber of Commerce
IRSAL 2017	Implementation Regulation of the Arbitration Law 2017
Model Law	The UNCITRAL Model Law on International Commercial Arbitration
NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
ICA	International Commercial Arbitration
SAL	Saudi Arbitration Law
Scottish Act	Arbitration (Scotland) Act 2010 (Scottish Act)
SAR	Scottish Arbitration Rules
UAE	United Arab Emirates
UNCITRAL	United Nations Commission on International Trade Law
UK	United Kingdom
US	United States of America

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Author's declaration

I declare that all the material contained in this thesis is my own work

Chapter One: Introduction

1.1 Statement of the Problem

International commercial arbitration (ICA) in Saudi Arabia has travelled a rocky road. The intention of its government, however, is to make Saudi Arabia more commercially attractive as a centre for international arbitration. A crucial part of this process is the Saudi Arbitration Law (SAL) of 2012. Based on the Model Law and enacted 'to create a legal framework for arbitration that is more in tune with international standards',[1] the SAL 2012 replaces the heavily criticised SAL 1983. Since it was enacted with the aim of modernising the approach to arbitration in Saudi Arabia, the problem to be addressed is whether the provisions of the SAL 2012 are consistent with the modern culture of ICA.

1.2 Research Question

Based on that problem, the research question is: By comparison with the UNCITRAL Model Law on International Commercial Arbitration (Model Law) and the Arbitration (Scotland) Act 2010 (Scottish Act), how consistent is the SAL 2012 with the core principles underlying modern ICA?

1.3 ICA and Saudi Arabia: the Rationale for the Research

1.3.1 Terminological issues

In this section, the basic terminology used in this thesis will be set out. The nature of arbitration is considered in the subsequent section and will not be explicated here. Following the Model Law approach, an arbitration is commercial if it arises from any 'relationship[s] of a commercial nature, whether contractual or not'.[2] While commerce

[1] Faris Nesheiwat and Ali Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia' (2015) 13 *Santa Clara Journal of International Law* 443, 444-445.

[2] This approach is explained in n 2 of Article 1 of the Model Law, but is not a formal part of that article.

is not defined by the Model Law, an ordinary definition is applicable and refers to: 'activities that relate to the buying and selling of goods and services'.[3]

The term international is used to distinguish those arbitrations that have a transnational or cross-border component from wholly domestic or national arbitrations.[4] Under article 1(3) of the Model Law, an arbitration is considered to be international if: the parties conduct business in different countries; the place of arbitration is in a different country to where the parties conduct their business; where any commercial dealings are conducted in a different country; where the 'subject-matter of the dispute is most closely connected to a different country'; or where 'the parties have agreed that the subject matter of the arbitration agreement relates to more than one country'. The consequence of this is that, for example, an arbitration conducted in Saudi Arabia between two Saudi firms will be international if the dispute relates to the overseas transportation and sale of oil.

A further distinction is that between a domestic (or national) arbitration and a foreign arbitration award. Here the terms domestic and foreign refer to the seat of arbitration. An award will be foreign in Saudi Arabia if the seat of the arbitration is in Geneva. If the seat is in Riyadh, then the award will be domestic even if some, or all, of the proceedings took place in Geneva. The Model Law prefers to distinguish between "international" and "non-international" rather than between "foreign" and "domestic" awards.[5] That distinction, however, remains important because of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (NY Convention), which explicitly applies to the recognition and enforcement of

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[3] *Merriam-Webster Dictionary* (Online 2015) <http://www.merriam-webster.com/dictionary/commerce> accessed 30 November 2017.

[4] Nigel Blackaby, Constantine Partasides QC, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration Practice* (6th edn, Oxford University Press 2015)1.19*ff*.

[5] UNCITRAL, 'Explanatory Notes to the Model Law', in *UNCITRAL Model Law on International Commercial Arbitration 1985: With amendments as adopted in 2006* (UN 2008), para 50.

foreign arbitration awards. Under the NY Convention, foreign arbitration awards are defined under article 1 as those:

> made in the territory of a State other than the State where recognition and enforcement of such awards are sought ... it shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

A final point of terminology is to note that the phrase "judicial review", which is widely used in the arbitration literature and community,[6] will also be used in this thesis. In the context of arbitration, judicial review refers to the review made by judges of a national court when an award, or arbitrator, is challenged. This should be distinguished from the other use of the term to specifically refer to the mechanism provided by administrative law for challenging a decision of a public body.[7] The distinction is clear from the context.

1.3.2 The nature of arbitration and its underlying principles

Arbitration is a type of dispute resolution allowing the parties to resolve a disagreement before the private forum of the arbitration tribunal. It provides an alternative to litigation and the public forum of the national courts.[8] The 'idea of arbitration', as Paulsson explains, 'is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in

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[6] *Quintette Coal Ltd v Nippon Steel Corp* [1991] 1 WWR 219; [1990] BCJ No 2241, [32] (BC Court of Appeal, Canada); Lord Hacking, 'The "Stated Case" Abolished: The United Kingdom Arbitration Act of 1979' (1980) 12 *International Lawyer* 95; Karon A Sasser, 'Freedom to Contract for Expanded Judicial Review in Arbitration Agreements' (2000) 31 *Cumberland Law Review* 337; Richard Garnett, Keith Steele, 'In search of an appropriate standard for reasons in arbitral awards' (2007) 10 *International Arbitration Review* 111, 112, 114; Gary Born, *International Commercial Arbitration* (Kluwer, 2009), p.2645-2648; Nick Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration Practice* (6th edn, Oxford University Press 2015), 10.66-10.88.

[7] David Feldman, 'Error of Law and Flawed Administrative Acts' (2014) 73 *Cambridge Law Journal* 275.

[8] Steven C Bennet, *Arbitration: Essential Concepts* (ALM Publishing 2002), 4.

chosen decision-makers'.[9] It possesses a number of ideal features that reflect the nature of arbitration and may be attractive to international commercial parties.[10] The process is flexible and defers to the parties over certain key decisions, such as the choice of forum, choice of law and the choice of arbitrators. Furthermore, the proceedings are private and the awards binding and enforceable.[11] Finally, the process should be efficient and cost-effective.[12] Thus, the ideal of the arbitration process is dispute resolution through a neutral,[13] private forum allowing a fair hearing, resulting in an enforceable award and implemented with sufficient flexibility to allow the parties to meaningfully shape the procedure according to their needs.[14]

Gaillard and Savage suggest that: 'arbitration should be defined by reference to two constituent elements which commentators and the courts almost unanimously recognize'.[15] These two elements are the arbitrator's 'judicial' task of resolving the dispute between the parties and the contractual 'source' of the arbitrator's role and authority. While the purpose of arbitration is reflected in the first of these two elements, it is the second element that grounds the fundamental principle of party autonomy. As Gaillard and Savage explain:

> party autonomy is found at every stage of the arbitral process and ... is perhaps the most fundamental difference between international

[9] Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013), 1.

[10] Gary Born, 'Recent Developments in International Arbitration' (2016) 5 *Indian Journal of Arbitration Law* 1.

[11] Christian Buhring-Uhle, 'A Survey on Arbitration and Settlement in International Business Disputes' in Christopher R Drahozal and Richard W Naimark (eds) *Towards a Science of International Arbitration* (Kluwer Law International 2005) 25, 31.

[12] Steven C Bennet, *Arbitration: Essential Concepts* (ALM Publishing 2002), 6-8.

[13] Christian Buhring-Uhle, 'A Survey on Arbitration and Settlement in International Business Disputes' in Christopher R Drahozal and Richard W Naimark (eds) *Towards a Science of International Arbitration* (Kluwer Law International 2005) 25, 31.

[14] Margaret L Moses, The Principles and Practice of International Commercial Arbitration (2nd edn, Cambridge University Press 2012), 1.

[15] Emmanuelle Gaillard and John Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer 1999), 11.

> commercial arbitration and the courts. Indeed, it will generally be when parties make effective use of their entitlement to tailor their own arbitration proceedings to their needs that international arbitration will provide cheaper and more satisfactory justice than any national court system.[16]

This reflects a conception of party autonomy in its wider sense, rather than the narrower conception of party autonomy, which refers simply to the contracting parties' right to select the law applicable to their contract and any dispute that arises from it.**[17]** For the purposes of this thesis, party autonomy will be used in its wider sense.

Etymologically, autonomy derives from the Greek for self-rule and may be used in the context of either nation states or individual persons to express the moral claim to a right of self-determination.[18] In realising this self-determination, autonomy requires the opportunity to choose between acceptable options.[19] Within the social context of a legal jurisdiction, those choices are both facilitated and restricted by the legal framework that regulates the behaviour of those who act within the boundaries of that jurisdiction. Within that framework, the law of contract allows individual parties to formally alter their reciprocal rights and obligations by agreement. This provides individuals with the choice that grounds the principle of party autonomy, which 'is one of the most important foundations of contract'.[20] Where a dispute arises between the parties, that same principle allows the parties to choose whether to resolve the

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[16] Emmanuelle Gaillard and John Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer 1999), 1.

[17] Karl-Heinz Bockstiegel, 'The Role of Party Autonomy in International Arbitration' (1997) *52 Dispute Resolution Journal* 24, 25.

[18] Daniel Philpott, In Defense of Self-Determination (1995) 105 *Ethics* 352; Richard H Fallon, 'Two Senses of Autonomy' (1994) 46 *Stanford Law Review* 875, 878; Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (2nd edn, University of Pennsylvania Press 2011), 27*ff*.

[19] Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988), 204-205.

[20] Hanoch Dagan, 'Autonomy, Pluralism, and Contract Law Theory' (2013) 76 *Law & Contemporary Problems* 19.

dispute through litigation or arbitration. While litigation is the forum for dispute resolution provided by the state, arbitration is, as noted above, grounded in an extension of the contractual agreement between the parties. Although enabled and facilitated by the state, the private, contractual basis of arbitration brings with it the principle of party autonomy, which allows the parties the 'freedom to design the arbitration procedure according to their needs'.[21] Indeed, the arbitration tribunal only gains its jurisdictional authority by virtue of the parties' agreement,[22] which makes it 'bound to follow the instructions of the parties' if it is not to exceed its authority.[23] Thus, '[p]arty autonomy is the ultimate power' allowing the parties the choice over key elements of the arbitration process.[24]

The contractual basis of commercial arbitration,[25] which grounds the fundamental principle of party autonomy, can only function within the legal frameworks established by the individual nation states.[26] Arbitration does not take place in a legal void, but must be enabled and facilitated by national laws that support the private contractual arrangements, enforcing the outcome and providing, through its courts, a means for dealing with any failures of the arbitration process.[27] Because of this dependence on their patronage, it is natural that nation states will seek to preserve their interests through the legal rules that determine the procedural options open to the parties. As will be discussed further in chapter four, the state has an interest in ensuring that procedural justice is both done and seen to be done. This state-based

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[21] Hong-Lin Yu, 'How far can party autonomy be stretched in setting the grounds for the refusal of arbitral awards' (2011) 14 *International Arbitration Law Review* 156.

[22] See further, chapter two.

[23] Giuditta Cordero-Moss, 'Limits to Party Autonomy in International Commercial Arbitration (2014) Issue 1 *Oslo law Review* 47, 49.

[24] Julian DM Lew, Loukas Mistelis and Stefan Michael Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), 3.

[25] Jean E Faure, 'The Arbitration Alternative: Its Time Has Come' (1985) 46 *Montana Law Review* 1.

[26] For discussion, see section 2.2.

[27] Giuditta Cordero-Moss, 'Limits to Party Autonomy in International Commercial Arbitration (2014) Issue 1 *Oslo law Review* 47, 49-51.

interest, which is reflected in the characterisation of arbitration as "quasi-judicial",[28] coincides with the interest of the parties in ensuring that disputes are resolved justly.[29] While it is arguable that the principle of party autonomy simply requires the dispute to be resolved to the satisfaction of the parties, it is unlikely that this will be achieved unless the parties perceive the arbitration process as just or fair.[30] Indeed, in one survey, fairness and justice were ranked as the most important characteristic of arbitration.[31] Thus, party autonomy and procedural justice must coexist as the fundamental principles governing the arbitration process.

Before considering the third principle that governs the arbitration process, it is first worth noting that the relationship between party autonomy and procedural justice is not a simple balance, offsetting the demands of one principle against the other.[32] Rather, the demands of the two principles are intertwined, which means that procedural justice is not simply a constraint on party autonomy, but also an expression of it. The connection between the two principles is reflected in the private interest in justice. In understanding the relationship, a distinction should be made between three senses in which autonomy may be used. First, autonomy may be used in the context of an autonomous dispute resolution system, independent of any national legal system.[33] The second sense is the use of the term in the context of party autonomy,

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[28] Wesley A Sturges, 'Arbitration - What Is It?' (1960) 35 *New York University Law Review* 1031, 1046-1047.

[29] Austin I Pullé, 'Securing Natural Justice in Arbitration Proceedings' (2012) 20 *Asia Pacific Law Review* 63, 65.

[30] John Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (Lawrence Erlbaum Associates 1975); Toni Makkai and John Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20 *Law and Human Behavior* 83; Tom R Tyler, 'Procedural Justice' in Austin Sarat (ed) *The Blackwell Companion to Law and Society* (Blackwell Publishing Ltd 2004) 435; For a full discussion, see chapter four.

[31] Richard W Naimark and Stephanie E Keer, 'What do parties really want from international commercial arbitration?' (2002) 57 *Dispute Resolution Journal* 78, 80.

[32] Hiro Naragaki, 'Constructions of Arbitration's Informalism: Autonomy, Efficiency and Justice' [2016] 1 *Journal of Dispute Resolution* 141, 152-155.

[33] Julian DM Lew, 'Achieving the Dream, Autonomous Arbitration' (2006) 22 *Arbitration International* 179; Jonathan Mance, 'Arbitration: a Law unto itself?' (2016) 32 *Arbitration International* 223.

which was discussed above as deriving from the contractual nature of arbitration. Also lying behind the concept of party autonomy is the autonomy of the individual, and it is this relationship between party autonomy and individual autonomy that connects party autonomy and procedural justice.

It is arguable that individual autonomy requires an element of rationality, ensuring that an individual's acts and decisions are consistent with his or her goals. This is modelled in a distinction between first and second order desires.[34] In the context of the individual party to an arbitration dispute, the first order desire may be characterised as the desire for a favourable outcome. If reflected upon, however, it would be rational for the individual to modify that first order desire to create the second order desire for a fair or just outcome. The rationality of this is revealed by considering this process of reflection from behind a Rawlsian veil of ignorance.[35] Behind the veil, individuals are denied any clues that may allow predictions regarding the outcome and are completely ignorant of whether the decision will go for or against them. This prevents any temptation to equate justice with a personally favourable outcome. The veil would not prevent the first order desire from forming, but since the individual cannot predict a personally favourable outcome it makes rational sense to modify that desire and instead want at least a fair and just process for resolving the dispute. Although the desire for, and hence the individual's interest in, a just process flows from individual autonomy, it nevertheless connects justice and party autonomy through the arbitration agreement and the contractual relationship between the parties. Both are the consequence of an expression of individual autonomy, which carries with it the individual's interest in a just process and outcome. This is reflected in the empirical evidence of what parties want from arbitration (see chapter four).

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[34] Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988), 20; Harry Frankfurt, 'Freedom of the will and the concept of a person', in Robert Kane (ed) *Free Will* (Blackwell Publishers 2002) 127.

[35] John Rawls, *A Theory of Justice: Revised Edition* (The Belknap Press 1999), 118.

Turning now to the third principle, which is cost-effectiveness. This encompasses the values of effectiveness and efficiency, which makes pragmatic common sense and needs little by way of justification. It would be pointless to have an ineffective process of arbitration and it is irrational to use a process that costs more than necessary. This does not mean that arbitration must necessarily cost less than litigation if it is to be a rational choice, since the advantages provided by a just system that respects party autonomy may outweigh the disadvantage of cost. It does mean, however, that in providing a framework for arbitration, the law should facilitate both the effectiveness of the process and its efficiency. This is reflected in the 2015 International Arbitration Survey,[36] which highlighted the importance of effectiveness by ranking enforceability of awards as the most valuable characteristic of arbitration. By contrast, and emphasising a concern with efficiency, the cost of the process was ranked as its worst characteristic, with a lack of speed also highlighted as an undesirable feature.

The importance of party autonomy, justice and cost-effectiveness is, for example, embodied by the general principles contained in s.1 of both the English and Scottish Acts.[37] The Scottish Act will be considered later, as part of the substantive comparative analysis. For present purposes, consider the example of the English Act. This states that its substantive provisions are based on, and should be interpreted in accordance with, the general principles, which highlight a 'fair resolution of disputes … without any unnecessary delay or expense' and the freedom of the parties to determine the arbitration procedure, which is 'subject only to such safeguards as are necessary in the public interest'.[38]

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[36] School of International Arbitration Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015), 6-7.

[37] This statute is relied on here for three reasons. First, to avoid pre-empting the comparative analysis that follows in the subsequent chapters. Second, England is one of the major providers of arbitration and English law is a popular choice of *lex arbitri*. Third, since the Scottish Act relied on the English Act, and its application in practice, the English Act is indirectly connected to the comparative analysis.

[38] English Act, s 1.

A key aspect of these general principles, in the example of the English Act, is that they must be balanced against each other, with a priority given to party autonomy. That priority is consistent with the private, contractual basis of arbitration. As discussed, it does not, however, mean that party autonomy should be unconstrained.[39] Although a 'fundamental value',[40] party autonomy is not the sole governing principle of arbitration, but must be balanced against both justice and cost-effectiveness. Party autonomy may, therefore, be restricted to safeguard the public interest, which - as discussed above - includes the state's interest in ensuring that justice is both done and seen to be done. As discussed in chapter four, this allows the courts to intervene only where an impropriety has, or will, result in a substantive injustice. A fair and just outcome is, in turn, prioritised over efficiency. As Fellas comments: '[a]n arbitrator could quickly decide a case by flipping a coin, but that would be capricious. Thus, speed cannot come at the cost of fairness and justice'.[41] Nevertheless, efficiency, as a component of cost-effectiveness, is acknowledged as important. Thus, as the English Act illustrates, there is a weighted, three-way balance between party autonomy, justice, and cost-effectiveness. These three principles form a 'magic triangle',[42] central to "best practice" in ICA.[43] As discussed below, these principles, and the balance between them, provide a useful way of assessing a legal framework established to support, facilitate and regulate arbitration.

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[39] Mia Louise Livingstone, 'Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?' (2008) 25 *Journal of International Arbitration* 529.

[40] Leon Trakman and Hugh Montgomery, 'The "Judicialization" of International Commercial Arbitration: Pitfall or Virtue?' (2107) 30 *Leiden Journal of International Law* 405, 409.

[41] John Fellas, 'A Fair and Efficient International Arbitration Process' (2004) 59 *Dispute Resolution Journal* 78, 80.

[42] Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3 *Groningen Journal of International Law* 110, 122.

[43] Leon Trakman and Hugh Montgomery, 'The "Judicialization" of International Commercial Arbitration: Pitfall or Virtue?' (2107) 30 *Leiden Journal of International Law* 405, 423.

1.3.3 A brief modern history of ICA in Saudi Arabia

Redfern observes that international arbitration is globally recognised: 'as the fairest and most effective method of resolving disputes between states, individuals, and corporations in almost all aspects of international investment, trade, and commerce'.[44] He ascribes this first, to the neutrality of the arbitration forum, a condition relevant to a just outcome, and second, to the enforceability of the award, which reflects the need for an effective process.[45] Menon, however, identifies four major issues with ICA. These are: judicialisation of the process, with associated costs and delays; a lack of ethical standards; unpredictability in enforcement; and unpredictability in the decisions of arbitration tribunals.[46] Of these issues, it is the problem of enforcement, compounded by the judicial interventionism of the national courts, that is most relevant to the characterisation of Saudi Arabia as an ICA unfriendly country.

The hostility to international arbitration in Saudi Arabia developed in the third quarter of the twentieth century. The initial phase, which followed World War II, prioritised Western principles of law over the domestic law of Islamic countries and 'stemmed principally from disputes arising out of long-term oil concessions concluded in circumstances of, or akin to, colonial tutelage'.[47] It is exemplified by the 1963 *Aramco* arbitration against the Saudi government and its reaction to the outcome.[48] The case

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[44] Alan Redfern, 'The Changing World of International Arbitration' in David D Caron, Stephan W Schill, Abby Cohen Smutny and Epaminontas E Triantafilou (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 45, 46.

[45] Alan Redfern, 'The Changing World of International Arbitration' in David D Caron, Stephan W Schill, Abby Cohen Smutny and Epaminontas E Triantafilou (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 45, 46-47.

[46] Sundaresh Menon, 'The Transnational Protection of Private Rights' in David D Caron, Stephan W Schill, Abby Cohen Smutny and Epaminontas E Triantafilou (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 17, 25-27.

[47] Charles N Brower and Jeremy K Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97 *The American Journal of International Law* 643, 643-644.

[48] Charles N Brower and Jeremy K Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97 *The American Journal of International Law* 643, 644; Whitney Hampton,

concerned Aramco's freedom over the transportation of oil to destinations outside of Saudi Arabia and whether the Saudi government could impose a legal obligation to use Satco tankers.[49] Following similar cases,[50] the tribunal held that while Saudi Arabian law was applicable, it should be interpreted according to, and supplemented by, general principles of law, commercial custom and 'notions of pure jurisprudence'.[51] This approach resulted in an award in favour of Aramco.[52]

The Saudi government accepted, and complied with, the decision. It was, however, dissatisfied with the outcome and subsequently prohibited any government agency from participating in arbitration without the approval of the Council of Ministers.[53] Consequently, the Saudi government 'abstained from international arbitration for decades afterwards'.[54] This consequence was characteristic of the second phase of increasing hostility to international arbitration, which reflected the view that international arbitration favoured Western companies.[55] This phase lasted from the 1970s to the early 1980s and witnessed a reluctance to participate in international

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'Foreigners Beware?: Exploring the Tension Between Saudi Arabian and Western International Commercial Arbitration Practices' (2011) *Journal of Dispute Resolution* 431, 437.

[49] *Saudi Arabia v Arabian American Oil Company (Aramco)* (1963) 27 ILR 117; Stephen M Schwebel, 'The kingdom of Saudi Arabia and Aramco arbitrate the Onassis agreement' (2010) 3 *Journal of World Energy Law & Business* 245.

[50] See: *Petroleum Development (Trucial Coast) Ltd v Sheikh of Abu Dhabi* (1951) 18 ILR 144; *The Ruler of Qatar v International Marine Oil Company Ltd* (1957) 20 ILR 534. Both discussed in: VD Degan, *Sources of International Law* (Kluwer 1997), 120-121. See also: Mark Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21 *New York International Law Review* 1, 18-19.

[51] *Saudi Arabia v Arabian American Oil Company (Aramco)* (1963) 27 ILR 117, 157, 166-169.

[52] *Saudi Arabia v Arabian American Oil Company (Aramco)* (1963) 27 ILR 117, 204.

[53] Implemented initially through a 1963 Council of Ministers Resolution (No 58), but subsequently incorporated, through article 3, into the Arbitration Law of 1983: George Sayen, 'Arbitration, Conciliation and the Islamic Legal Tradition in Saudi Arabia' (2003) 24 *University of Pennsylvania Journal of International Economic Law* 905, 909-910.

[54] Stephen M Schwebel, 'The kingdom of Saudi Arabia and Aramco arbitrate the Onassis agreement' (2010) 3 *Journal of World Energy Law & Business* 245, 25256.

[55] Yahya Al-Samaan, 'The Settlement of foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia' (1994) 9 *Arab Law Quarterly* 217, 219.

arbitration.[56] Along with the dominance of conservative traditionalism,[57] this experience meant that it was not until the third phase, triggered by the increasing importance of international commerce and characterised by a reversal of the hostility to arbitration, that the Saudi government was motivated to introduce the SAL 1983.

The SAL 1983,[58] and associated Implementation Rules,[59] established an explicit legal framework for all arbitration, both domestic and ICA, in Saudi Arabia. Importantly, article 7 of the Implementing Rules allowed an arbitration clause to be formally recognised, which overcame the previous refusal of *Sharia* courts to recognise arbitration clauses as valid contracts because they related to a possible dispute in the future and so were considered *gharar* (uncertain or speculative).[60] Furthermore, it allowed parties to appoint their own arbitrators, established certain time limits to facilitate an efficient process,[61] and provided for a process of enforcement.[62] Initially enforcement of foreign awards was guaranteed only for signatories to the Convention of the Arab League on the Enforcement of Judgments 1952.[63] Enforcement of awards from non-signatory countries could, however, be enforced on a discretionary

[56] Charles N Brower and Jeremy K Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97 *The American Journal of International Law* 643, 645-646.

[57] Alwalid Abdulrahman Alalshaikh, 'The 2012 Arbitration Reform in the Kingdom of Saudi Arabia: An Examination of the 2012 Arbitration Law Reform' (PhD thesis, University of Kent 2017)

[58] Arbitration Law 1983, Royal Decree No M/46.

[59] Implementation Rules 1985, Royal Decree No M/7/2021.

[60] Abdulrahman Baamir and Ilias Bantekas, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2009) 25 *Arbitration International* 239, 250. The authors explain that the previous characterisation of arbitration contracts as *gharar* was a mistake under the applicable *Hanbali* jurisprudence.

[61] See, eg, SAL 1983, article 9.

[62] Nancy B Turck, 'Resolution of Disputes in Saudi Arabia' (1991) 6 *Arab Law Quarterly* 3, 21.

[63] The Board of Grievances Regulation 1983, Royal Decree No M/51.

reciprocal basis.[64] This enforcement was formally extended to other foreign awards in 1994, when Saudi Arabia became a party to the NY Convention.[65]

Although the legislation and accession to the NY Convention were clear signs of a more arbitration friendly approach,[66] significant issues remained. These included: the *Sharia* prohibition of interest (*riba*) and speculative (*gharar*) contracts, which allowed Saudi courts to refuse enforcement of foreign awards on public policy grounds;[67] the obligation to conduct the arbitration in Arabic;[68] the gender and religious restrictions imposed on the appointment of arbitrators, which like the language restrictions impacted on party autonomy;[69] some ambiguity in drafting, creating 'opportunities for a party to delay proceedings';[70] the excessive involvement of Saudi courts, which reviewed all arbitration awards to ensure *Sharia* compliance before they became binding;[71] and the possibility of having to restart the arbitration process following the review.[72] Furthermore, even before arbitration could begin, under articles 6 and 7 of the Rules, approval had to be sought from the competent

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[64] Minister of State, President of the Board of Grievances, Circular 7, 15/8/1405H (1984); Nancy B Turck, 'Resolution of Disputes in Saudi Arabia' (1991) 6 *Arab Law Quarterly* 3, 22-23.

[65] Whitney Hampton, 'Foreigners Beware?: Exploring the Tension Between Saudi Arabian and Western International Commercial Arbitration Practices' (2011) *Journal of Dispute Resolution* 431, 438.

[66] Kristin T Roy, 'The New York Convention and Saudi Arabia: Can A Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards' (1995) 18 *Fordham International Law Journal* 920, 923.

[67] Charles N Brower and Jeremy K Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97 *The American Journal of International Law* 643, 649; Mark Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21 *New York International Law Review* 1, 10.

[68] SAL 1983, article 25

[69] Faisel M Al-Fadhel, 'Respect for Party Autonomy under Current Saudi Arbitration Law' (2009) 23 *Arab Law Quarterly* 31, 37, 52-53.

[70] George Sayen, 'Arbitration, Conciliation and the Islamic Legal Tradition in Saudi Arabia' (2003) 24 *University of Pennsylvania Journal of International Economic Law* 905, 915.

[71] SAL 1983, Article 20.

[72] Whitney Hampton, 'Foreigners Beware?: Exploring the Tension Between Saudi Arabian and Western International Commercial Arbitration Practices' (2011) *Journal of Dispute Resolution* 431, 439-440.

authority,[73] which for commercial disputes was the Board of Grievances. As Turck noted: '[w]hereas in most countries one of the reasons to select arbitration is to avoid court procedures and delays, Saudi arbitration is directly linked with the commercial committees and courts'.[74]

This approach under the SAL 1983 established a procedure that necessarily prolonged the process through the involvement of the competent authority. Given that the trend in modern arbitration is to limit the involvement of the courts, allowing arbitration to proceed as autonomously as possible, the approach under the SAL 1983 was unfortunate. The initial check of the arbitration instrument by the competent authority did allow problems with legal formalities to be resolved prior to arbitration.[75] That benefit was, however, outweighed by the negative impact of such a requirement on the duration of the arbitration process, the perception of arbitration in Saudi Arabia and, importantly for ICA, party autonomy and the desire to avoid the involvement of the national courts.[76] As Rawach and El-Rayes suggest, an initial check on the arbitration instrument could just as easily be carried out by an arbitration institution, which would be more consistent with the purpose of arbitration as an alternative to litigation.[77]

As noted at the start of this section, one of the major issues with the SAL1983, was the excessive involvement of the courts throughout the arbitration process. This included the obligation to seek initial approval prior to the commencement of arbitration, and the need for the competent authority to confirm the award, under

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[73] Eid Rawach and Rezeq El-Rayes, 'The law of arbitration in Saudi Arabia: reality and perceptions' (2006) 5 *International Business Journal* 617, 624.

[74] Nancy B Turck, 'Resolution of Disputes in Saudi Arabia' (1991) 6 *Arab Law Quarterly* 3, 20.

[75] Eid Rawach and Rezeq El-Rayes 'The law of arbitration in Saudi Arabia: reality and perceptions' (2006) 5 *International Business Journal* 617, 624

[76] Faisel M Al-Fadhel, 'Respect for Party Autonomy under Current Saudi Arbitration Law' (2009) 23 *Arab Law Quarterly* 31, 33.

[77] Eid Rawach and Rezeq El-Rayes 'The law of arbitration in Saudi Arabia: reality and perceptions' (2006) 5 *International Business Journal* 617, 625.

article 20, before it became final and effective. In addition, the SAL 1983 was criticised regarding the scope of the courts' jurisdiction where one of the parties objected to an award. Under articles 18 and 19, the competent authority was afforded the power to hear the dispute and determine whether the award should be confirmed, or the objection upheld. They did not, however, specify any limits on the scope of the court's authority, which meant that a review of the merits of the arbitration decision was not excluded and the national courts became courts of appeal for disgruntled parties.[78] This created an issue for arbitration in Saudi Arabia, which was unable to produce an award that could be considered final and binding. Any award was subject to a merits review by the Board of Grievances, which could result in the award being vacated or even reversed.[79]

A final issue was that of enforcement,[80] which for foreign awards was considered 'the exception rather than the rule'.[81] The SAL 1983 was silent on the procedure for enforcement of a foreign award. Furthermore, despite acceding to the NY Convention in 1994,[82] the enforcement of foreign awards has been characterised as 'notoriously difficult', because they were 'subjected to a *de novo* review' of the merits of the award under Saudi law.[83] Additionally, awards would not be enforced if they were contrary to public policy,[84] which is derived from the *Sharia*, the public interest and public

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[78] Eid Rawach and Rezeq El-Rayes 'The law of arbitration in Saudi Arabia: reality and perceptions' (2006) 5 *International Business Journal* 617, 626-627.

[79] See the case discussed in: Christopher Mainwaring-Taylor and John Beaumont, 'Saudi Arabia: domestic arbitration awards in Saudi Arabia' (2009) 12 *International Arbitration Law Review* N59.

[80] Shaheer Tarin, 'An analysis of the influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Practices' (2015) 26 *American Review of International Arbitration* 131, 143.

[81] Faisal Ad-Fadhel, 'Recognition and enforcement of arbitral awards under current Saudi arbitration law' (2009) 30 *Company Lawyer* 249, 255.

[82] See: New York Arbitration Convention, 'Contracting States' <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> accessed 30 November 2017.

[83] George Sayen, 'Arbitration, Conciliation and the Islamic Legal Tradition in Saudi Arabia' (2003) 24 *University of Pennsylvania Journal of International Economic Law* 905, 911(n 19).

[84] Kristin T Roy, 'The New York Convention and Saudi Arabia: Can A Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards' (1995) 18 *Fordham International Law Journal* 920, 953-954.

morality.[85] In particular, the enforcement of foreign awards was problematic, because foreign arbitrators were unlikely to have been fully cognisant of the scope of Saudi public policy and how it might impact on enforcement of an award.[86]

1.3.4 The need for change and the way forward

Although the SAL 1983 was a significant forward step for arbitration in Saudi Arabia, the wealth of opinion that developed over the years following its enactment was that further reform was foreseeably necessary to improve the process of arbitration and the enforcement of the award.[87] The impetus for reform was driven by the unfriendly legal framework as discussed above. The called-for reform has been implemented by the SAL 2012, the Enforcement Law 2012 and the Implementation Regulations of the Arbitration Law (IRSAL) 2017. The question is how well these laws reflect the needs of international commerce by providing a legal framework that achieves an appropriate balance between the principles of party autonomy, justice and cost-effectiveness.

While not devaluing the importance of justice and cost-effectiveness, the trend in modern arbitration has been to maximise party autonomy.[88] Based on the earlier discussion of the three core principles, however, any progressive reform must enhance party autonomy within a just and cost-effective process. To be consistent with modern arbitration culture, the legal framework should ringfence the

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[85] Abdulrahman Baamir and Ilias Bantekas, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2009) 25 *Arbitration International* 239, 263.

[86] Abdulrahman Baamir and Ilias Bantekas, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2009) 25 *Arbitration International* 239, 263.

[87] See the discussion above and, eg: Eid Rawach and Rezeq El-Rayes 'The law of arbitration in Saudi Arabia: reality and perceptions' (2006) 5 *International Business Journal* 617, 627; Faisal Ad-Fadhel, 'Recognition and enforcement of arbitral awards under current Saudi arbitration law' (2009) 30 *Company Lawyer* 249, 254; Abdulrahman Yahya Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Ashgate 2010), 148.

[88] Karl-Heinz Bockstiegel, 'The Role of Party Autonomy in International Arbitration' (1997) *52 Dispute Resolution Journal* 24, 25.

jurisdictional authority of the arbitration tribunal ensuring that the courts play a supportive role that facilitates a just and effective arbitration process.[89] This legal framework, however, must account for the Islamic nature of the country.

In developing a modern arbitration culture that will attract ICA to Saudi Arabia, the pervasive nature of *Sharia* must be appreciated. It governs all aspects of Islamic life,[90] including law, politics and commerce.[91] As article 1 of the country's Basic Law of Governance of 1992 states: 'The Kingdom of Saudi Arabia is a sovereign Arab Islamic state. Its religion is Islam and its constitution is the Holy *Qur'an* and the prophet's (peace be upon him) *Sunnah*'. Building on this, article 7 states that: 'The authority of the regime is derived from the Holy *Qur'an* and the prophet's *Sunnah* which rule over this and all other state laws'. And, under article 23 the state has the obligation to 'protect the Islamic creed and ... apply Islamic *Sharia*'. The point of noting the relevance of *Sharia* is not to suggest that Saudi law could never be considered arbitration friendly from the perspective of the international arbitration community. Rather, it is to highlight the necessary relevance of *Sharia*, which 'is not an obstacle to international commercial arbitration',[92] but must be accounted for by any law within the kingdom.[93]

While the relevance of the *Sharia* is important, the deficiencies of the SAL 1983 had more to do with the Saudi government's experience of international arbitration than

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[89] Thomas E Carbonneau, *Carbonneau on International Arbitration: Collected Essays* (JurisNet 2011), 128-129.

[90] The *Sharia*, which means the way or path to follow, derives from the Holy *Qur'an* and the *Sunnah*: Ahmed, Zaki Yamani, 'The Eternal Shari'a' (1979) 12 *International Law and Politics* 205.

[91] S Breckenridge Thomas, 'International Arbitration: A Historical Perspective and Practice Guide Connecting Four Emerging World Cultures: China, Mexico, Nigeria and Saudi Arabia' (2006) 17 *American Review of International Arbitration* 183, 202-204.

[92] Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28 *Loyola of Los Angeles International and Comparative Law Review* 565, 621.

[93] See, Radwa, S. Elsaman, 'Factors to be Considered Before Arbitrating in the Arab Middle East: Examples of Religious and Legislative Constraints' (2011) 1(2) *International Commercial Arbitration Brief* 8.

with the constraints of *Sharia* law *per se*.[94] The procedural requirements of Islamic law are consistent with Western notions of natural justice and,[95] as Baamir has noted: '[the] Hanbali corpus of [*Sharia*] law is in fact more flexible than Saudi law'.[96] Although the SAL 1983 was a significant advance for Saudi Arabia, it fell short of the expectations of the international arbitration community, primarily because of the extensive supervisory powers it afforded to the competent authority.[97] This may have afforded the Saudi government the reassurance that it remained in control of arbitration in the country, but it was out of kilter with the approach to arbitration in other countries. By the time the SAL 2012 was enacted, new legislation and further modernisation of the arbitration culture and process in Saudi Arabia was long overdue. In particular, there was a need to reduce the role of the courts, facilitate party autonomy, enhance enforcement and ensure that arbitration is both effective and efficient without compromising justice.

1.3.5 Socio-cultural context

While the focus of this thesis is on the legal implementation of the three core normative principles underpinning ICA, it is worth briefly explaining the socio-cultural context of Saudi Arabia.[98] The aim is to provide a backdrop for the normative and doctrinal analysis that follows in the main body of the thesis. This should provide insights that help to explain some of the differences between the legal regulation of arbitration in Saudi Arabia, a comparatively new state established in 1932, when

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[94] Mark Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21 *New York International Law Review* 1, 34; Abdulrahman Baamir and Ilias Bantekas, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2009) 25 *Arbitration International* 239, 239-240.

[95] Mark Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21 *New York International Law Review* 1, 45. See further, chapter four.

[96] Abdulrahman Yahya Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Ashgate 2010), 148.

[97] George Sayen, 'Arbitration, Conciliation and the Islamic Legal Tradition in Saudi Arabia' (2003) 24 *University of Pennsylvania Journal of International Economic Law* 905, 912.

[98] Socio-cultural is here used as a shorthand term that includes the cultural, social, political and legal issues that constitute the background context for the legal regulation of arbitration.

compared to Scotland and the Model Law jurisdictions. The socio-cultural context is also important to understanding the proposals for possible reforms to the SAL 2012. It is particularly relevant to the possibility and limitations of using legal transplants, which refers to the 'borrowing' of legal rules,[99] to improve the legal regulation of arbitration in Saudi Arabia.[100]

The historical context of modern arbitration in Saudi was explained in the previous section. As part of this discussion, the relevance of *Sharia* was noted. In this section, the relevance of *Sharia* will be elaborated, particularly in relation to commercial activity and arbitration. This will be considered against the background of the political aspirations for Saudi Arabia as a significant nation in the world of international commerce. This discussion begins with some comments regarding Saudi Arabia's socio-economic context and its vision for the future.

In their 2004 analysis, Wilson observes that Saudi Arabia benefited from a robust economy, which in 2001 was the 'largest economy in the Middle East', and an 'increasingly educated' population.[101] He further notes that Saudi Arabia, an oil rich and dependent country, has long pursued the policy of economic modernisation through diversification, while preserving social stability and traditional Islamic and social values.[102] In this regard, he observes that Saudi Arabia's adherence to *Wahhabism*, a conservative form of Islam that 'adhere[s] to the teachings of the

[99] Alan Watson, *Society and Legal Change* (2nd edn, Temple University Press 2001), 98.

[100] Legal transplantation will be considered further in the section on the comparative element of the methodology (1.4.1.3).

[101] Rodney Wilson, (with Abdullah Al-Salamah, Monica Malik and Ahmed Al-Rajhi), *Economic Development in Saudi Arabia* (Routledge Curzon 2004), 1.

[102] Rodney Wilson, (with Abdullah Al-Salamah, Monica Malik and Ahmed Al-Rajhi), *Economic Development in Saudi Arabia* (Routledge Curzon 2004), 2, 6, 21.

Hanbali [school of jurisprudence]',[103] has not been a barrier to 'reconcil[ing] modern financial and commercial practice with the demands' of the Holy *Qur'an*.[104]

As part of its economic development, Saudi has moved to a market economy and sought investment from foreign companies,[105] which raises the possibility of international commercial disputes and the need for an attractive dispute resolution system. The Saudi Arabian government has attempted to address this need through the establishment of the Saudi Centre for Commercial Arbitration and the modernisation of the legal regulation of arbitration,[106] which forms the focus of this research. This modernisation, which has popular support,[107] is part of a wider process that involves the ongoing development of 'a dualistic legal system' that allows 'a separate Western-based commercial law system to function within the Islamic law umbrella',[108] reducing the impact of the conservative *Wahhabist* approach to the development of *Sharia* law.[109] This modernisation has been achieved by

[103] Bryant W Seaman, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development' (1980) 18 *Columbia Journal of Transnational Law* 413, 423.

[104] Rodney Wilson, Abdullah Al-Salamah, Monica Malik and Ahmed Al-Rajhi, *Economic Development in Saudi Arabia* (Routledge Curzon 2004), 14.

[105] Amr Daoud Marar, 'Saudi Arabia: The Duality of the Legal System and the Challenges of Adapting Law to Market Economies' (2004) 19 *Arab Law Quarterly* 91, 92, 106; Ministry of Foreign Affairs, *Saudi Arabia and Political, Economic & Social Development* (May 2017), 6,

[106] Shearman & Sterling LLP and Dr Sultan Almasoud & Partners, *Arbitration in the Kingdom of Saudi Arabia* (January 2017) <https://www.shearman.com/~/media/Files/NewsInsights/Publications/2017/01/Arbitration-in-the-Kingdom-of-Saudi-Arabia-IA-012017.pdf> accessed 08 May 2018.

[107] David Pollock, 'Saudi Public Opinion: A Rare Look' (27 January 2010) The Washington Institute, Policy Watch No 1625 <https://www.washingtoninstitute.org/policy-analysis/view/saudi-public-opinion-a-rare-look> accessed 13 July 2018.

[108] Amr Daoud Marar, 'Saudi Arabia: The Duality of the Legal System and the Challenges of Adapting Law to Market Economies' (2004) 19 *Arab Law Quarterly* 91. 93.

[109] Dana Zartner, *Courts, Codes and Custom: Legal Tradition and State Policy toward International Human Rights and Environmental Law* (Oxford University Press 2014), 127, 132-133.

supplementing *Sharia* law (*fiqh*), filling any legal regulatory gaps with legal rules established through secular, administrative legislation.[110]

Within this dual, or hybrid, system, *Sharia* law, which derives its authority from the divine revelation of Allah's will,[111] is dominant to the secular legislation enacted by the government to facilitate modernisation. As noted above, this means that any legislation must be consistent with *Sharia*, which imposes certain restrictions on any legal regulation of arbitration. The most relevant are the *Sharia* prohibitions of interest (*riba*); uncertain or speculative transactions (*gharar*); and certain forbidden (*haram*) goods and services such as pork, alcohol, pornography, gambling. Beyond these well-established restrictions, and particularly given the liberal attitude of the *Hanbali* school of Islamic jurisprudence to freedom of contract,[112] the legal regulation of commercial arbitration should not be affected by *Sharia*. Furthermore, the duality of the legal system in Saudi is also evidenced in the court system, which relies on dedicated *Sharia* courts for issues of *Sharia* law, while using secular courts, or committees, to hear disputes governed by legislative rules of law.[113] This approach reinforces the distinction between disputes that engage *Sharia* law and those governed by legislation.

Sharia law, or *fiqh*, is part of the wider *Sharia*, which provides a normative guide for all areas of life.[114] The aim for any devout Muslim following the *Sharia* is to be

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[110] Bryant W Seaman, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development' (1980) 18 *Columbia Journal of Transnational Law* 413, 415-416.

[111] Ahmed Zaki Yamani, 'The Eternal Shari'a' (1979) 12 *International Law and Politics* 205; Bryant W Seaman, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development' (1980) 18 *Columbia Journal of Transnational Law* 413, 416-417

[112] Bryant W Seaman, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development' (1980) 18 *Columbia Journal of Transnational Law* 413, 422.

[113] Bryant W Seaman, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development' (1980) 18 *Columbia Journal of Transnational Law* 413, 439-450.

[114] AA Mawdudi, *Islamic Way of Life* (Scribe Digital 2012), 3.

rewarded in the hereafter with a place in the 'Gardens of perpetuity'.[115] This is achieved through the development of an Islamic personality,[116] characterised by the virtues of, *inter alia*, justice ('*adl*) balance (*mizan*), moderation (*la israf*), honesty, truthfulness and fairness.[117] Under *Sharia*, unless something is forbidden (*haram*), then it is permissible (*halal*), although something may be considered permissible and desirable (*tayyib*), such as hard work, or undesirable, such as hoarding money. Furthermore, *Sharia* imposes moral obligations (*fard*) such as honesty, being just and respecting others.[118] Given that 'everything of interest to human beings that does not cause harm is permissible,[119] nothing in this ethical system should prevent the adoption of a suitable legal framework for the regulation of modern ICA.[120] However, the emphasis in Islam on the importance of justice may support a framework that prioritises justice over the other core principles of party autonomy and cost-effectiveness. Furthermore, the weight given to justice may receive support from the Islamic conception of autonomy, which, unlike the more individualistic liberal conception, imposes moral and social constraints on self-determination (see further 3.2.2).

Before ending this section with the vision for Saudi Arabia's future, and its relevance to ICA, it is first worth highlighting the issue of women in Saudi Arabia. Although the status of women in Saudi Arabia is an on-going debate,[121] and the social and

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[115] The Holy *Qur'an*, chapter 98, verses 7-8. See also, chapter 43 verses 69-73.

[116] Suzanne Haneef, *What Everyone Should Know About Islam and Muslims* (14th ed, Library of Islam 1996), 73.

[117] The Holy *Qur'an*, chapter 4, verse 135; Masudul Alam Choudhury, 'Islam versus liberalism: contrasting epistemological inquiries' (2008) 35 *International Journal of Social Economics* 239, 245. See also: Talal Asad, 'Agency and Pain: an Exploration' (2000) 1 *Culture and Religion* 29, 50.

[118] Suzanne Haneef, *What Everyone Should Know About Islam and Muslims* (14th ed, Library of Islam 1996), 100.

[119] Essam A Alsheikh, 'Distinction between the Concepts Mediation, Conciliation, *Sulh* and Arbitration in *Shari'ah* Law' (2011) 25 *Arab Law Quarterly* 367, 368.

[120] Faisal Kutty, 'The *Shari'a* Factor in International Commercial Arbitration' (2006) 28 *Loyola of Los Angeles International and Comparative Law Review* 565, 620.

[121] Sherifa Zuhur, *Saudi Arabia* (ABC-Clio 2011), 372-374.

political activism of the 'Saudi Woman's Spring' is still in its early stages,[122] their opportunities for education and employment have been increasing since the end of the twentieth century.[123] Saudi women have yet to achieve full participation in society, but they have now established a space within 'the public sphere' and political arena,[124] providing an opportunity for them to challenge their marginalised role in Saudi society.[125] In business, women still have to overcome cultural barriers, including family resistance, gender stereotypes and a regulatory system that favours men,[126] such as the need for female entrepreneurs to use a male 'legal intermediary' in all public business transactions.[127] However, with the increased opportunities for education, employment and entrepreneurship, the country is changing towards a more inclusive society with greater social, economic, and political opportunity for women.[128] As will be discussed further in chapter three,[129] as part of this ongoing process, Saudi women can practice as lawyers and are now also training and practicing as arbitrators.[130]

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[122] Manal al-Sharif, 'Driving My Own Destiny' (Fall 2012) *Virginia Quarterly Review* 96, 101.

[123] Nora Alarafi Pharaon, 'Saudi Women and the Muslim State in the Twenty-First Century' (2004) 51 *Sex Roles* 349.

[124] In 2011 women were given the right to join the Consultative (Shura) Council, to vote in municipal council elections and stand as candidates: Hani Zedan, 'Saudi Arabia' (2010-2011) 16 *Yearbook of Islamic and Middle Eastern Law* 241, 242. In 2017, women held 20% of the parliamentary seats: The World Bank, 'Saudi Arabia' (2018) *Proportion of seats held by women in national parliament (%)* <https://data.worldbank.org/indicator/SG.GEN.PARL.ZS?locations=SA> accessed 14 May 2018; Ministry of Foreign Affairs, *Saudi Arabia and Political, Economic & Social Development* (May 2017), 45-46.

[125] Madawi Al-Rasheed, *A Most Masculine State: Gender Politics and Religion in Saudi Arabia* (Cambridge University Press 2013), 1-3.

[126] Ahmed Al-Asfour, Hayfaa A Tlaiss, Sami A Khan, James Rajasekar, 'Saudi women's work challenges and barriers to career advancement' (2017) 22 *Career Development International* 184, 194-195.

[127] Diane HB Welsh, Esra Memili, Eugene Kaciak, Aliyah Al Sadoon, 'Saudi women entrepreneurs: A growing economic segment' (2014) 67 *Journal of Business Research* 758.

[128] Ministry of Foreign Affairs, *Saudi Arabia and Political, Economic & Social Development* (May 2017), 6.

[129] See sections 3.2.4.1 and 3.3.3.

[130] Mulhim Hamad Almulhim, 'The First Female Arbitrator in Saudi Arabia' (Online, 29 August 2016) *Kluwer Arbitration Blog* <http://kluwerarbitrationblog.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/> accessed 30 November 2017.

Turning now to Saudi Arabia's future, it should be noted that Saudi utilises a process of centralised economic planning that has previously been expressed and implemented through successive five-year plans from 1970 onwards.[131] Although all the plans were concerned with diversification,[132] earlier plans focused on infrastructure and education, while the seventh (2000-2005) and eighth (2005-2010) plans focused on economic growth in the private sector as a route to economic diversification.[133] More recently, in 2016, the 'Deputy Crown Prince Mohammed bin Salman unveiled Vision 2030', which is aimed at reinforcing the 'political and societal development' of Saudi Arabia as 'an investment powerhouse', with relaxed restrictions on foreign ownership and investment.[134] For the Deputy Crown Prince, the 2030 vision rests on three key pillars, two of which are relevant to the context of ICA within Saudi Arabia. The first of these is the development of Saudi Arabia as a 'global investment powerhouse'. The second is to develop Saudi as 'an epicentre of trade', utilising its geographical advantage as a 'hub connecting … Asia, Europe and Africa'.[135] Underlying the 2030 vision are three core themes: a vibrant society driven by Islamic principles; a thriving economy that allows the development of a larger private sector, with a reduced role for the government; and the ambition to develop and efficient, transparent system of accountable and responsible governance.[136]

One of the key aspirational goals is to move from its current position as the world's 19th largest economy to a position in the top 15 economies.[137] Specifically, Saudi Arabia aims to create an attractive commercial environment, with vibrant 'economic cities' and a transformed King Abdullah Financial District with 'competitive

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[131] Sherifa Zuhur, *Saudi Arabia* (ABC-Clio 2011), 140.

[132] Bassam A Albassam, 'Economic diversification in Saudi Arabia: Myth or reality?' (2015) 44 *Resources Policy* 112, 116-117.

[133] Sherifa Zuhur, *Saudi Arabia* (ABC-Clio 2011), 141.

[134] Ministry of Foreign Affairs, *Saudi Arabia and Political, Economic & Social Development* (May 2017), 1, 27.

[135] Kingdom of Saudi Arabia, *Vision 2030* (April 2016), 6.

[136] Kingdom of Saudi Arabia, *Vision 2030* (April 2016), 13, 45.

[137] Kingdom of Saudi Arabia, *Vision 2030* (April 2016), 47.

regulations and procedures', to encourage foreign investment and business.[138] The vision is ambitious and may only be partially achieved,[139] however, for present purposes, its importance lies in the emphasis on economic liberalisation,[140] development and the openness to international engagement. Although arbitration is not explicitly mentioned as part of the vision, the need for arbitration services accompanies the development of international commerce and the enlargement of the private sector. In this regard, it may be noted that the National Transformation Program, which has been devised to help implement the Vision 2030 goals, includes the intention to launch three branches of the Saudi Centre for Commercial Arbitration.[141] This suggests that a growth in arbitration is envisaged. Such growth should be supported by a legal framework that facilitates the delivery of competitive arbitration services in line with the core principles of modern ICA. Furthermore, as Saudi Arabia continues in its development as a modern, competitive and commercially attractive country, so economic competitiveness and the normalising pressures of globalisation (already evident in the reliance on the Model Law as the basis for the SAL 2012) will result in the modernisation of the environment that provides the context for arbitration.[142] This, in turn, should alter expectations and facilitate further reform of the legal framework for ICA. This may be enabled by the increasingly influential and assertive Consultative Council, whose members include accomplished businessmen, and which has the authority to make proposals for reforming the law.[143] As noted above, however, any such reform must remain consistent with the tenets of Islam and the *Sharia*.

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[138] Kingdom of Saudi Arabia, *Vision 2030* (April 2016), 50, 55.

[139] Jane Kinnemont, *Vision 2030 and Saudi Arabia's Social Contract: Austerity and Transformation* (July 2017) Chatham House Research Paper, 3, 10, 11.

[140] Sarah Moser, Marian Swain, Mohammed H Alkhabbaz, 'King Abdullah Economic City: Engineering Saudi Arabia's post-oil future' (2015) 45 *Cities* 71, 73.

[141] Kingdom of Saudi Arabia, *National Transformation Program* (2016), 91.

[142] Tom Ginsburg, 'The Culture of Arbitration' (2003) 36 *Vanderbilt Journal of Transnational Law* 1335, 1342-1343.

[143] Frank E Vogel, 'Shari'a in the Politics of Saudi Arabia' (2012) 10 *The Review of Faith & International Affairs* 18, 24.

1.4 Research Methodology and Methods

Although a distinction is not always made between "method" and "methodology", for the purposes of this thesis the terms will be used to distinguish between two elements of the research process. After reviewing the literature, Mackenzie and Knipe concluded that:

> *methodology* is the overall approach to research linked to the [research] paradigm or theoretical framework while the *method* refers to systematic modes or tools used for collection and analysis of data.[144]

Methodology is concerned with generalised forms of systematically organised activity that is made credible by its connection to a rich history of social practice.[145] This highlights the theoretical basis of the research activity, grounded in a reliance on approaches that have been accepted as reasonable by the research community. Such a relationship, between the researcher's activity and accepted methodologies, allows confidence in the outcome of the research. Based on this understanding, the research method will be used to refer to the mechanics of data identification and retrieval, while the research methodology will refer to the theory underlying the approach to analysing and using the data.

1.4.1 Methodology

In deciding on an appropriate methodology, it is important to appreciate that the nature of the research question determines the type of argument required to support a convincing answer. The type of argument, in turn, affects the type of data required to support the claim or proposition being defended. This connection between the

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[144] Noella Mackenzie and Sally Knipe, 'Research dilemmas: Paradigms, methods and methodology' (2006) 16 *Issues in Educational Research* 193 <http://www.iier.org.au/iier16/2006conts.html> accessed 30 November 2017.

[145] Alexander M Novikov and Dmitry A Novikov, *Research Methodology: From Philosophy of Science to Research Design* (CRC Press 2013), 8.

research question, the argument and the data determine whether the chosen methodology is appropriate.[146]

The research question is:

> By comparison with the Model Law and the Scottish Act 2010, how consistent is the SAL 2012 with the core principles underlying modern ICA?

That question may be broken down into its constituent issues and these determine the relevant methodologies utilised to answer the research question. The starting point is a normative analysis of arbitration to identify and understand the implications of the core principles that underlie modern ICA. These principles provide the tools that allow the SAL 2012 to be normatively assessed. That assessment is conducted within the framework of a comparative legal analysis using the Model Law and the Scottish Act as comparators. That comparison requires a doctrinal analysis of the Model Law, the Scottish Act and the SAL 2012. This doctrinal analysis may then be used as the basis for the comparative normative analysis that determines how well the SAL 2012 implements the core principles governing modern ICA. Thus, the research methodology involves doctrinal, normative, and comparative elements.

1.4.1.1 The doctrinal element

Doctrinal, or black letter, legal research involves a systematic and critical interpretative analysis of primary and secondary sources of law to determine, as precisely and coherently as possible,[147] 'what the law is in a particular area'.[148] This requires the researcher to identify and explicate the legal rules and principles, and

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[146] Dirk Hartmann and Rainer Lange, 'Epistemology culturalized' (2000) 31 *Journal for General Philosophy of Science* 75, 98.

[147] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2102) 17 *Deakin Law Review* 83, 84, 101.

[148] Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh University Press 2010) 16, 18-19.

their relationships within the legal framework. It is a qualitative analysis of the law on its own terms, assessing the extent, comprehensiveness and coherence of the legal framework,[149] using reasoned argument to justify the researcher's interpretation of the meaning of the legal norms.[150] It is an inevitable component of any comparative legal research, as the law of different jurisdictions cannot be compared without knowing and understanding the law in each of the relevant jurisdictions. Given the comparative nature of the research, the aim of the doctrinal analysis in this thesis is, therefore, to provide a critically descriptive account of the Model Law and the law governing ICA in both Scotland and Saudi Arabia.

In this thesis, the doctrinal analysis focused primarily on the SAL 2012, with the Model Law and the Scottish Act used as comparators (see 1.4.1.3). Although the analysis applied the same doctrinal methodology to each of these, it should be noted that the different contexts of the SAL 2012, the Model Law and the Scottish Act necessarily impacted on the individual analyses. To begin with, while the SAL 2012 and the Scottish Acts are pieces of legislation that form part of the national law of Saudi Arabia and Scotland respectively, the Model Law is not itself law, but a document adopted by the UNCITRAL with the goal of harmonising and improving national law. While the Model Law may nevertheless be analysed in isolation, to gain a deeper understanding of its provisions, it is necessary to rely on the case law from countries that have implemented the Model Law to a greater or lesser extent and remaining more or less faithful to its provisions. This means that the doctrinal analysis must consider cases from a range of "Model Law countries" and must take into account that the implementation of the Model Law varies from country to country.[151]

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[149] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2102) 17 *Deakin Law Review* 83, 101, 114.

[150] George H Taylor, 'Critical Hermeneutics: The Intertwining of Explanation and Understanding as Exemplified in Legal Analysis' (2000) 76 *Chicago-Kent Law Review* 1101, 1107-1108; Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh University Press 2010) 16, 22; Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 1,4.

[151] Pieter Sanders, 'Unity and Diversity in the Adoption of the Model Law' (1995) 11 *Arbitration International* 1.

As such, care was required to ensure that the Model Law cases relied on in the analysis were based on national legislative provisions that remained sufficiently faithful to the original Model Law articles on which they are based.

A second contextual distinction that impacts on the doctrinal analysis lies in the different legal traditions of the two national jurisdictions of Scotland and Saudi Arabia. Scots law is classified as a mixed or hybrid system, relying on both the civil, or Roman, and the common, or English, legal traditions.[152] Saudi Arabia is also a mixed legal system, but rather than being a common/civil law hybrid, the two elements of the Saudi legal system are *Sharia*-based law (*fiqh*) and modern legislative law (*siyasa*) that follows the civil law tradition and is influenced by the French and Egyptian systems.[153] This legislative element, while involving the *Shura* Council and the Council of Ministers, which proposes and reviews draft laws,[154] ultimately relies on the authority of the King. Under the rule of law inherent to *Sharia*,[155] the doctrine of *siyasa* allows the King to legitimately authorise *Sharia*-permissible legislation to secure the public good and fill the gaps left by the rules of *fiqh*, which has been essential to the governance of modern commercial activity, including arbitration.[156]

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[152] Bryan Clark and Gerard Keegan, *Scottish Legal System* (3rd edn, Dundee University Press 2012), 1-2.

[153] Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2 *Arab Law Quarterly* 286. See also: Joseph L Brand, 'Aspects of Saudi Arabian Law and Practice' (1986) 9 *Boston College International & Comparative Law Review* 1, 26; Abdullah F Ansary, 'Update: A Brief Overview of the Saudi Arabian Legal System' (August 2015) *GlobaLex* <http://www.nyulawglobal.org/globalex/Saudi_Arabia1.html#_edn434> accessed 03 May 2018;

[154] Law of the Council of Minister 1993 Royal Decree No A/13, articles 20, 21, 22.

[155] Asifa Quraishi-Landes, 'The *Sharia* Problem with *Sharia* Legislation' (2105) 41 *Ohio Northern University Law Review* 545, 546.

[156] Frank E Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Brill 2000), 173-174. See also: Joseph L Brand, 'Aspects of Saudi Arabian Law and Practice' (1986) 9 *Boston College International & Comparative Law Review* 1, 20-24; Torki A Alshubaiki, 'Developing the Legal Environment for Business in the Kingdom of Saudi Arabia: Comments and Suggestions' (2013) 27 *Arab Law Quarterly* 371, 381.

The significance of this distinction is twofold. First, while both are hybrid systems that involve a civil/Roman law element, Scots Law relies centrally on the doctrine of precedent, while the law in Saudi Arabia does not.[157] This makes case law of far greater significance in Scotland, where it is an authoritative source of law, than in Saudi Arabia where the decisions in individual cases are not authoritative. Second, the priority of *Sharia*, as the ultimate authority for legitimacy in law-making, means that the legal rules implemented through legislation must be consistent with *Sharia*. This does not mean that they need to be based on, or derived directly from, the authoritative texts of the *Hanbali* school, which is the school of Islamic jurisprudence followed in Saudi Arabia.[158] It does, however, mean that the *siyasa* rules should be consistent with the spirit of *Sharia* and are limited to provisions not already determined by *fiqh*. Furthermore, unlike Scotland where legislation overrides any previous conflicting common law, the *siyasa* rules are subordinate to, and overruled by, any conflicting rules of *fiqh*.[159]

As a consequence of these distinctions, the doctrinal analysis, while relying on the same method of critical interpretation, inevitably varies according to the context as discussed above. Thus, the analysis of the Model Law engages with both the Model Law itself and with case law from several Model Law jurisdictions. These cases are not assessed in any comparative sense, but are used to gain a better understanding of the Model Law provisions and how they might be interpreted and implemented in national law. The analysis of the Scottish Act also relies on any relevant case law to aid the interpretation of the provisions of the Act. The analysis of the SAL 2012, however, is almost entirely focused on the statute itself, with limited reliance on case law. That analysis must necessarily also account for the interaction between the legislation and *Sharia*. As noted above, the aim of the doctrinal analysis was to

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[157] Bryant W Seaman, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development' (1980) 18 *Columbia Journal of Transnational Law* 413, 441.

[158] Abdullah F Ansary, 'Update: A Brief Overview of the Saudi Arabian Legal System' (August 2015) *GlobaLex* <http://www.nyulawglobal.org/globalex/Saudi_Arabia1.html#_edn434> accessed 03 May 2018; Bryant W Seaman, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development' (1980) 18 *Columbia Journal of Transnational Law* 413, 421.

[159] Frank E Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Brill 2000), 174-175.

provide an understanding of the frameworks of legal rules established by each of these three instruments. That understanding was then subject to the comparative normative analysis presented in this thesis.

1.4.1.2 The normative element

As noted above, the question of whether the legal rules set down in the SAL 2012 are justified by the core principles of modern ICA is essentially a normative question. Normative questions can only be fully addressed through a normative analysis.[160] While a doctrinal analysis engages with what the law is, a normative analysis engages with what the law should be, relating legal norms to moral and other social norms.[161] For the purposes of this thesis, it builds on the doctrinal analyses by allowing the SAL 2012 to be critiqued by reference to the ideals of the normative principles underlying the 'standards of conduct' expected by the modern ICA community.[162] The aim is to identify and explicate the gap between what the law is, as a framework of norms prescribing the permitted or required 'standards of conduct', and what it should be. This, in turn, provides scope for proposing reforms to narrow the gap.

The normative approach adopted in this thesis accepts the objective nature of law as 'a matter of social fact'.[163] It relies on a positivist understanding of law. This makes a clear distinction between law and morality, and holds that the validity of the law is determined by the formal law-making requirements rather than its content.[164] It does not, however, preclude a normative analysis of the content and allows for the

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[160] Ralph Wedgwood, *The Nature of Normativity* (Oxford University Press 2007), 17, 24.

[161] Matthias Baier, 'Introduction' in Matthias Baier, *Social and Legal Norms: Towards a Socio-legal Understanding of Normativity* (Ashgate Publishing Limited 2013) 1.

[162] Reza Banakar, 'Can Legal Sociology Account for the Normativity of Law?' in Matthias Baier, *Social and Legal Norms: Towards a Socio-legal Understanding of Normativity* (Ashgate Publishing Limited 2013) 15, 16.

[163] Jaap Hage, 'The Method of a Truly Normative Legal Science' in Mark Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 19, 26.

[164] Herbert LA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994).

argument that the law's content should be changed to be more consistent with the normative demands of the regulated subject matter. While normative argument relies on a subjective perspective, it is constrained by the objective requirements that the argument is logical, coherent, consistent and supported by the best available evidence.[165] The point is to persuade the reader that any normative claims have strength and should be accepted.

1.4.1.3 The comparative element

While the normative analysis allows an assessment of the SAL 2012 judged against the ideal, a comparative approach grounds that analysis in the reality of law in practice. It involves a 'dialectic' exchange between two or more legal systems to generate a better understanding of the relevant law and provide knowledge that may be a valuable resource for reform of the law.[166] In this thesis, that exchange was between the SAL 2012, the Model Law and the Scottish Act (see 1.5). While the Model Law is not itself part of a legal system and only becomes law when formally adopted, it has been widely adopted for national domestic arbitration law.[167] It was introduced with the aim of providing a uniform or harmonised approach to ICA and 'reflects a worldwide consensus on the principles and many of the important issues of international arbitration practice'.[168] As such, it provides a useful benchmark that is independent of any of the contextual concerns inherent to a national law.

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[165] Jaap Hage, 'The Method of a Truly Normative Legal Science' in Mark Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 19, 33-34.

[166] Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014), 11.

[167] Pieter Sanders, 'UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future' (2005) 21 *Arbitration International* 443.

[168] Gerold Hermann, 'Introductory Note on the UNCITRAL Model Law on International Commercial Arbitration' (1985) 1 *Uniform Law Review os* 285.

The practicalities of this comparative analysis involve a micro-level assessment that engages with 'concrete legal concepts [and] rules',[169] and aims to identify, from a normative perspective, the similarities and differences between the SAL 2012, the Model Law and the Scottish Act. The goal of the comparison is directed by the research question,[170] facilitated by the main and subsidiary hypothesis as explicated below in section 1.7. The aim behind the research question is to determine how well the SAL 2012 implements the core principles of modern ICA, and subsequently to propose reforms that may improve the legal framework. The role of the comparative analysis is to compare and contrast the way in which the legal frameworks established by the Model Law and the Scottish Act implement the three core principles with the approach taken in the SAL 2012 and accompanying laws. For this thesis, then, the core principles of ICA formed the primary *tertium comparationis*,[171] or starting point of comparison. Furthermore, given the recent history of arbitration in Saudi Arabia, the relationship between arbitration and the courts provided an additional point of comparison.

The approach adopted involved four analytical stages.[172] The first stage was to set out a theoretical understanding of the application of the core principles to an idealised theoretical legal framework for arbitration. This was done by dividing the task into particular elements of the arbitration process, based on the way in which those

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[169] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (December 2015) *Law and Method* 1, 29, DOI: 10.5553/REM/.000010 <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001> accessed 22 May 2018.

[170] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (December 2015) *Law and Method* 1, DOI: 10.5553/REM/.000010 <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001> accessed 22 May 2018.

[171] TP van Reenen, 'Major theoretical problems of modern comparative legal methodology (1): The nature and role of *the tertium comparationis*' (1995) 28 *Comparative and International Law Journal of South Africa* 175; John C Reitz, 'How to do Comparative Law' (1998) 46 *The American Journal of Comparative Law* 617, 622.

[172] Marie Luce Paris, 'The Comparative Method in Legal Research: The Art of Justifying Choices' (2016) *UCD Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper* No 09/2016, 15-16.

elements are regulated by the Model Law. The theoretical understanding of the core principles was explored in the context of each relevant element. This theoretical analysis was then used to inform an initial analysis of the SAL 2012, the Model Law and the Scottish Act, which examined both how they implement the three core principles of party autonomy, justice and cost-effectiveness and how they limit the involvement of the national courts.

This preparatory stage of the analysis provided sufficient contextualised knowledge of the three legal frameworks to allow their subsequent comparison.[173] The Model Law was first compared to the approach taken by the Scottish Act and the Scottish Arbitration Rules (SAR), set down in Schedule 1 of the Act, with the aim of identifying the strengths and weaknesses of both legal frameworks. The final stage of the comparison used those analyses as the basis for a comparative assessment of the SAL 2012, focusing on the way in which the legal rules may further the goals of arbitration with the aim of identifying the better solution.[174] The comparative analysis allowed the main and subsidiary hypotheses to be tested, with the consequential identification of areas of the SAL 2012 that might be improved. It also provided insights into reforms that were subsequently proposed, including the transplantation of modified legal rules drawn from the Model Law and the Scottish Act.

In carrying out this comparison, it was necessary to be aware of, and account for, the differing socio-legal contexts of the main jurisdiction with those used as comparators.[175] This is important both for the initial comparison and for any proposals

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[173] Danny Pieters, 'Functions of comparative law and practical methodology of comparing: Or how the goal determines the road!' KU Leuven University Lecture Transcript, 13-14 <https://www.law.kuleuven.be/personal/mstorme/Functions%20of%20comparative%20law%20and%20practical%20methodology%20of%20comparing.pdf> accessed 22 May 2018.

[174] Konrad Zweigert and Hein Kotz, *Introduction to Comparative Law* (3rd edn, Clarendon Press 1998), 15, 34-35.

[175] Mathias Siems, *Comparative Law* (Cambridge University Press 2014), 19; Mark Van Hoecke, 'Methodology of Comparative Legal Research' (December 2015) *Law and Method* 1, 3, 7, 16, DOI: 10.5553/REM/.000010 <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001> accessed 22 May 2018.

that seek to utilise legal rules transplanted from one of the comparators. As discussed in sections 1.3.5 and 1.4.1.1, the main contextually relevant difference relates to the central importance of *Sharia* in Saudi Arabia. Unlike the law in Scotland, where legislation is secular and supplemented by a precedent-based system of case law, legislation in Saudi Arabia plays a secondary, supplementary role to *Sharia* law. It must be consistent with *Sharia*, and its role is to fill the gaps in the regulatory framework established by *fiqh*. Thus, any criticism of Saudi law, based on a comparative analysis with non-Islamic jurisdictions, must consider the constraints imposed by the *Sharia* and *fiqh*. The relevance of *Sharia*, however, should not be overstated, particularly since the dual legal system in Saudi Arabia means that cases involving legislation are decided by secular, rather than *Sharia*, courts.

As explained above, Saudi Arabia is seeking to develop as a competitive, international commercial force. Modernisation in Saudi Arabia is facilitated by the dualistic legal system that uses legislation as a tool for implementing progressive and internationally competitive economic and commercial policies. This provides an opportunity for a comparative analysis with other commercially attractive arbitration legal frameworks, such as that found in Scotland and the Model Law. Indeed, the openness of Saudi Arabia to learn from and utilise external approaches is evidenced by its reliance on the Model Law in drafting the SAL 2012. While any legal transplants may need to be modified to account for the different socio-cultural context,[176] the government's intention to develop an internationally attractive commercial environment requires 'legal adaptability' and creates a 'social need' to be open to the culture of international commerce and ICA.[177] This does not negate the relevance of Islam and *Sharia*, but it does allow an analytical focus on the norms of modern ICA. Thus, beyond the commercial prohibitions imposed by the *Sharia* and in the context of a dual legal system, there are few obstacles to a direct comparison and the use of modified legal transplantations to reform the legal framework regulating ICA in Saudi Arabia. The relevance of *Sharia*, and any other cultural issues

[176] Mathias Siems, *Comparative Law* (Cambridge University Press 2014), 197-199.

[177] Mathias Siems, *Comparative Law* (Cambridge University Press 2014), 121-123.

(such as the role of women, the societal and commercial expectations of confidentiality,[178] and any differences in the understanding of concepts such as autonomy and justice) are considered at the relevant points of the comparative analysis.

It should finally be noted that, while it is not formally included in the comparative analysis, the argument presented in this thesis also engages occasionally with the English Act and associated jurisprudence. As a non-Model Law country, the use of English legislation and case law provides a valuable counterpoint to the approach of the Model Law, serving to illustrate and clarify certain arguments and points made in this thesis. Furthermore, English Law is relied on as a tool for predicting, in the absence of a sufficient body of Scottish case law, how an issue might be decided by the Scottish courts.

1.4.2 Methods

The research method was to apply the methodologies outlined above to allow a critical, interpretative analysis of text-based information. That information included both primary and secondary sources. The main primary sources were legislation and case law. Arabic primary sources used included case law and the Holy Qur'an, although quotes from the Qur'an were taken from an English translation. The main secondary sources were: peer reviewed articles; working or research papers; books, or book chapters; government publications; and newspapers. The sources referred to in the thesis are all published in English. Arabic sources were considered, but all of the commentaries on arbitration law were published in English, as were other relevant academic commentaries. The relevant information was identified by a structured search of electronic databases. The keywords used as part of the systematic search strategy were guided by the issue being researched, but included combinations of terms, such as: arbitration; commercial arbitration; ICA; arbitration award; arbitration

[178] Roszaini Haniffa, Mohammad Hudaib, 'Locating audit expectations within a cultural context: The case of Saudi Arabia' (2007) 12 *Journal of International Accounting, Auditing and Taxation* 179, 186.

tribunal; party autonomy; natural justice; procedural justice; enforcement; jurisdiction; competence-competence; Model Law; Saudi Arabia; and Scotland.

1.5 Choice of Jurisdictions

As apparent from the research question, the research focuses on the two jurisdictions of Saudi Arabia and Scotland, with the Model Law providing a common point of comparison. The aim behind the research question is to examine the SAL 2012. Given the criticisms of the previous approach to arbitration in Saudi Arabia, and the relatively recently intent to change that approach, it is important to critically examine the law enacted to achieve that change. As a leading member of the Gulf Cooperation Council (GCC), and a world leading producer and exporter of oil,[179] Saudi Arabia is a commercially important country in the Middle East. This commercial importance, alongside its recent history of maintaining an hostile environment for arbitration and the enactment of new laws as part of a move to generate a more positive environment for arbitration, provides the motivation and justification for the primary focus on Saudi Arabia.

In choosing the comparators for the analysis of the SAL 2012, the following factors were considered. First, the pragmatic factors were language and access to the materials and knowledge that allow for a more nuanced comparative analysis.[180] These factors favour the use of comparators for which a wide range of materials are accessible in either English or Arabic. Second, the restrictions of PhD study, which impose limits on the time available for research and the word count for the written thesis. This makes it reasonable to use a limited number of comparators in order to allow for greater depth of analysis. To facilitate this, it was decided to restrict the

[179] International Energy Agency, *Key World Energy Statistics* (IEA 2015), 11.

[180] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (December 2015) *Law and Method* 1, 4, DOI: 10.5553/REM/.000010 <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001> accessed 22 May 2018.

analysis to Saudi Arabi and two comparators.[181] It should, however, be noted that the use of the Model Law (see below) as a comparator opened up a range of jurisdictions where the Model Law has been differently implemented. Third, it was important for the comparators to be respected as paradigmatic exemplars of an appropriate legal framework for regulating ICA. Fourth, the more contemporaneous the comparator the better since more recent regulation will have had the benefit of being informed by both the most contemporary debates and the experience gained from the operation of previously implemented frameworks. Fifth, an element of innovation in the legal framework was considered valuable, providing a reason to select the innovative jurisdiction over a more conservative approach that brings nothing new to the analysis. Sixth, the two comparators should be sufficiently different to justify including both frameworks. Seventh, the final factor is the nature of the relationship between the SAL 2012 and the comparators.[182]

Scotland was chosen as a comparator for both positive and negative reasons. The positive reasons, which are grounded in the factors set out above, are those that make the Scottish legal framework useful to the comparative analysis of the SAL 2012. The negative reasons are those that explain why the legal frameworks of other jurisdictions are less useful. The positive reasons will be set out first, in the following paragraph. The negative reasons will be discussed subsequently.

First, like the SAL 2012 in Saudi Arabia, the Scottish Act and the SAR were relatively recent enactments and motivated by the same goal of making the country a more attractive environment for ICA. Second, departing from the Model Law, the Scottish Act was drafted with the intention of providing a single, comprehensive set

[181] Mathias Siems, *Comparative Law* (Cambridge University Press 2014), 15,

[182] Danny Pieters, 'Functions of comparative law and practical methodology of comparing: Or how the goal determines the road!' KU Leuven University Lecture Transcript, 15 <https://www.law.kuleuven.be/personal/mstorme/Functions%20of%20comparative%20law%20and%20practical%20methodology%20of%20comparing.pdf> accessed 22 May 2018.

of rules 'in line with generally accepted international standards and ... practice'.[183] To achieve this, it drew on the key principles expressed by the Model Law and by the English Arbitration Act 1996 (English Act).[184] Although not beyond criticism, by developing on both the Model Law and the English Act, the Scottish Act is an exemplar of modern commercial arbitration law,[185] which justifies its selection as a point of comparison for the SAL 2012. Third, through the creation of a unique arbitration framework combining the main statutory provisions with the comprehensive Scottish Arbitration Rules (SAR) of schedule 1, the Scottish approach is innovative.[186] This innovative approach provides the opportunity to engage not just with the legal rules but also with the legal framework itself. Alongside the framework, the Scottish approach also contains other innovations, such as the role of the arbitration appointments referee, that make it attractive as a comparator for the Saudi legal framework given Saudi Arabia's commercial ambitions. Fourth, from a pragmatic perspective, using the Scottish Act for comparison does not create any difficulties with language or access to sources of information.

Because the Model Law is used as a comparator (see below), it is better to look beyond the Model Law countries for the other comparator. Given the pragmatic limitations of language and access to materials, ruling out France and Sweden for example, the most obvious choices are Scotland, England or the US. The US was rejected as an option because its law is reliant on the Federal Arbitration Act 1925, which provides for only a minimal framework and is a comparatively ancient piece

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[183] Scottish Parliament, *Arbitration (Scotland) Bill Policy Memorandum* (2009), para 57 <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16034.aspx> accessed 30 November 2017.

[184] Scottish Parliament, *Arbitration (Scotland) Bill Policy Memorandum* (2009), paras 57 <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16034.aspx> accessed 30 November 2017.

[185] David Wilson, 'The Resurgence of Scotland as a Force in International Arbitration: The Arbitration (Scotland) Act 2010' (2010) 27 *Journal of International Arbitration* 679; Roy L Martin and Steven P Walker, 'A New Scottish Export - Scottish International Arbitration' (2012) 18 *The Columbia Journal of European Law Online* 3.

[186] Hew R Dundas. 'The Arbitration (Scotland) Act 2010: A Great Collaborative Success and an Innovative Model for Other Jurisdictions To follow' (2016) 5 *Indian Journal of Arbitration Law* 81.

of legislation that has been supplemented *ad hoc* by a complicated wealth of judge made law. Indeed, Carbonneau goes so far as to state that, 'there can be little doubt that the Federal Arbitration Act (FAA) is in need of overhaul'.[187] Such a condemnation suggests that US law would be an unsuitable comparator for the purposes of this thesis. Furthermore, at the start of this thesis, work was underway on the Third Restatement of The US Law of International Commercial Arbitration.[188] Given that this immense and 'challenging' project was still ongoing it seemed an inappropriate time to use US law as a comparator for this thesis when other, far more modern legislative frameworks were available. As such, the choice was essentially between Scotland and England. Scotland was preferred because the legislation is more recent and, as explained above, more innovative than the English Act. The benefit of the Scottish Act, then, is the added value that comes from the innovative elements that were implemented to build on the experience of the English Act and the Model Law. The main disadvantage of using Scotland is that, as a small jurisdiction, and given the relatively recent enactment of the Scottish Act, the case law is limited. However, where the Scottish Act is modelled on the English Act then English case law may be used to understand how the rule would be applied.[189] .

The Model Law provides an ideal common point of comparison since it is considered, to a greater or lesser extent, by both the SAL 2012 and the Scottish Act. Furthermore, by its very nature, the Model Law represents a legal framework that is acceptable to the international community of the United Nations.[190] With its revision in 2006, the Model Law provides a legal framework that reflects the nature and principles of modern ICA. Finally, legislation based on the Model Law has been adopted by 111

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[187] Thomas E Carbonneau, *Toward a New Federal Law on Arbitration* (Oxford University Press 2014), 4.

[188] Catherine A Rogers, Ank Santens and Suyash G Paliwal, 'The US Law of International Commercial Arbitration Restated' (2014) 21 *Dispute Resolution Magazine* 8.

[189] Arbitration Application (No.3 of 2011) [2011] CSOH 164, [8].

[190] UN General Assembly, Resolution on the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (1985) A/RES/40/72.

jurisdictions within 80 states.[191] This provides a wealth of experience and case law that allows a deeper understanding of its principles and provisions. Given the limited case law in Scotland, and the lack of accessible cases in Saudi Arabia, the cases from Model Law jurisdictions should provide useful guidance on how the SAL 2012 could, or should, be applied to support and facilitate the arbitration of disputes.

1.6 Originality

The concept of originality is vague, difficult to define and subject to diverse understandings in the context of PhD theses.[192] While the requirement for originality seems to demand a substantive or 'significant' contribution to the body of knowledge within the relevant field, this need only be a small 'incremental' step,[193] rather than a ground breaking advance.[194] Phillips and Pugh note that there are at least 15 ways in which a thesis may satisfy the requirement for originality.[195] Of these, the most relevant for this thesis may be synthesised into an understanding of originality expressed as: the use of different methodologies to analyse the still relatively new law of arbitration in Saudi Arabia to generate an original understanding of the SAL 2012 that allows new proposals to be made for further reforms to the law. In the following discussion, it will be explained how the present research satisfies the requirement for originality.

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[191] UNCITRAL, Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> accessed 30 May 2018. Note that these figures include Scotland, which is no longer a Model Law country since the enactment of the Scottish Act in 2010.

[192] Gillian Clarke and Ingrid Lunt, 'The concept of "originality" in the Ph.D.: how is it interpreted by examiners?' (2014) 39 *Assessment & Evaluation in Higher Education* 803.

[193] Estelle Phillips and Derek S Pugh, *How to Get a PhD: A Handbook for Students and Their Supervisors* (5th edn, McGraw-Hill Education 2010), 70. Paul Gill and Gina Dolan, 'Originality and the PhD: what is it and how can it be demonstrated?' (2015) 22 *Nurse Researcher* 11.

[194] Gillian Clarke and Ingrid Lunt, 'The concept of "originality" in the Ph.D.: how is it interpreted by examiners?' (2014) 39 *Assessment & Evaluation in Higher Education* 803, 818.

[195] Estelle Phillips and Derek S Pugh, *How to Get a PhD: A Handbook for Students and Their Supervisors* (5th edn, McGraw-Hill Education 2010), 69-70.

Although still a relatively new statute, the SAL 2012has been analysed and discussed in several short articles,[196] and has been the subject of some recent PhDs, and a book,[197] which mainly focused on general descriptive and doctrinal analyses and the issue of recognition and enforcement of awards.[198] The research presented here builds on those existing commentaries to provide an in-depth understanding of the strengths and weaknesses of its provisions. Although the SAL 2012 has previously been compared to both the Model Law,[199] and the Scottish Act,[200] the present research differs from those analyses by assessing the law through the normative lens comprised of the core principles of modern ICA. Accepting there is nothing particularly original in the use of doctrinal, normative and comparative methodologies, the particular combination of the three methodologies distinguish the

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[196] See, eg: Salah Al Hejailan, 'The New Saudi Arbitration Act: A Comprehensive and Article-by Article Review' (2012) 4 *International journal of Arab Arbitration* 15; Mohammad Al-Hoshan, 'The New Saudi Law on Arbitration: Presentation and Commentary' (2012) 4 *International Journal of Arab Arbitration* 5; Khalid Alnowaiser, 'The New Arbitration Law and its Impact on Investment in Saudi Arabia' (2012) 29 *Journal of International Arbitration* 723; Abdulrahman Yahya Baamir, 'The new Saudi Arbitration Act: evaluation of the theory and practice' (2012) 15 *International Arbitration Law Review* 219; Dina Elshurafa, 'The 2012 Saudi Arbitration Law and the Sharia factor: a friend or foe in construction?' (2012) 15 *International Arbitration Law Review* 132; Jean-Pierre Harb and Alexander G Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 *Journal of International Arbitration* 113; Jean-Benoit Zegers, 'National Report for Saudi Arabia', in: Jan Paulsson (ed) (Kluwer Law International 1984, Supplement No 75 2013) *International Handbook on Commercial Arbitration* 1; Saud Al-Ammari and A Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30 *Arbitration International* 387; Nayla Comair-Obeid 'Salient Issues in Arbitration From an Arab Middle Eastern Perspective' (2014) 4 *The Arbitration Brief* 52; Shaheer Tarin, 'An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices' (2015) 26 *American Review of International Arbitration* 131.

[197] Mohamed Khairi Al-Wakeel, *Comments on the New Saudi Arbitration Law* (King Fahd National Library, 2014/1435H).

[198] Albara A Abulaban, 'The Saudi Arabian Arbitration Regulations: A comparative study with the English Act of 1996 and the Arbitration Scotland Act of 2010' (PhD thesis, University of Stirling 2015); Mohammed I Aleisa, 'A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?' (PhD thesis, University of Essex 2016); Alwalid Abdulrahman Alalshaikh, 'The 2012 Arbitration Reform in the Kingdom of Saudi Arabia: An Examination of the 2012 Arbitration Law Reform' (PhD thesis, University of Kent 2017).

[199] Faris Nesheiwat and Ali Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia' (2015) 13 *Santa Clara Journal of International Law* 443.

[200] Albara A Abulaban, 'The Saudi Arabian Arbitration Regulations: A comparative study with the English Act of 1996 and the Arbitration Scotland Act of 2010' (PhD thesis, University of Stirling 2015).

analysis of the SAL 2012 in this thesis from any of the previous analyses of that statute, or indeed the legal regulation of arbitration in Saudi Arabia more generally.

It is through this combination of methodologies that the current research provides an original perspective on the legal regulation of arbitration in Saudi Arabia. Rather than focusing solely on doctrinal issues, or on the issues of party autonomy or procedural justice as independent concerns, the research presented here recognises the interdependence of the three core principles of modern ICA,[201] and uses that understanding to facilitate an original analysis of the legal regulation of Saudi Arabia. This original understanding of the interaction, particularly between party autonomy and procedural justice, is explained further in the following paragraphs (see also 1.3.2).

The three core principles that provide the foundations for a balanced arbitration framework and ground the current analysis are: procedural justice; party autonomy; and cost-effectiveness. As a somewhat trite starting point, arbitration must be capable of effectively resolving disputes if it is to provide a meaningful alternative to litigation. While the effectiveness of arbitration may be characterised as its ability to produce an enforceable award, this does not distinguish it from litigation as a mechanism for dispute resolution. Rather, the distinction lies in the respect given to party autonomy, embodied in choice and flexibility. This respect should not, however, provide an unfettered discretion to parties, since that risks undermining procedural justice.

An unjust arbitration process is unlikely to be acceptable to the parties and an inflexible process that fails to respect party autonomy by restricting the parties' choice over key aspects of the proceedings gives commercial actors little or no reason to select arbitration over litigation. Thus, even beyond the ability of the arbitration to

[201] Hiro Naragaki, 'Constructions of Arbitration's Informalism: Autonomy, Efficiency and Justice' [2016] 1 *Journal of Dispute Resolution* 141.

produce an enforceable award, the process must be both just and respect party autonomy.[202] For completeness, the analysis should also consider the relevance of cost-effectiveness, but this principle should take second place to the balance between the key principles of party autonomy and procedural justice.

The emphasis on the two key principles will vary depending on the part of the process under scrutiny. However, a normative, principle-based comparative analysis, such as this, must engage with both procedural justice and party autonomy. As was explained above, this is not simply about balancing the two principles. Rather, it involves a deeper understanding of the interaction between them, a consequence of which is that party autonomy cannot be fully respected unless the process of arbitration is also just. It is this focus on the balance and interaction between justice and party autonomy, as the foundation for the comparative analysis of the SAL 2012, that distinguishes this thesis from the previous analyses that are more strictly doctrinal and allows this research to make an original contribution to the literature.

1.7 The Hypotheses, Arguments and Structure of the Thesis

As discussed above, the research that grounds this thesis is essentially qualitative in nature, relying on a comparative doctrinal and normative analysis of the SAL 2012. The aim of this analysis is to determine how well the SAL 2012 balances the core principles of justice, party autonomy and cost-effectiveness to establish a legal framework that is fit for the purposes of modern ICA. Although the research is qualitative, it may nevertheless be useful to explain it by explicating the main hypotheses and the underlying arguments reflected in the deductive nature of the analysis. It should, however, be noted that the reference to hypothesis should not be taken to imply that the analysis involves a scientific determination of fact through observation and statistical analysis. Rather, the hypotheses will be confirmed or

[202] Hiro Naragaki, 'Constructions of Arbitration's Informalism: Autonomy, Efficiency and Justice' [2016] 1 *Journal of Dispute Resolution* 141, 155.

refuted through reasoned judgment based on data generated by the comparative analysis of the SAL 2012.[203]

The main hypothesis is derived from the analysis of modern ICA presented in section 1.3.2, which identified the 'magic triangle'[204] of party autonomy, justice and cost-effectiveness as the three core principles that must inform the drafting and implementation of any legal regulatory framework. Therefore, the main hypothesis, which is reflected in the research question detailed in section 1.2, is that the SAL 2012 implements a legal framework the reflects an appropriate balance between: respecting party autonomy; ensuring a just process; and securing a cost-effective award. Whether the balance is "appropriate" is a matter of judgment rather than fact and so can only be supported by reasoned argument, rather than proven as true or disproven as false. That judgment engages with five subsidiary hypotheses that also derive from the discussion in section 1.3.2.

The first two of these hypotheses follow from the argument that the arbitration process should respect party autonomy because the arbitrator's power and jurisdiction to resolve the dispute flows from the private agreement between the parties and so derives from party autonomy. The first subsidiary hypothesis, then, is that the SAL 2012 establishes a legal framework that respects the parties' decision to resolve the dispute through arbitration. The second subsidiary hypothesis is that the provisions of the SAL 2012 establish a legal framework that respects party autonomy through an inherent flexibility that empowers the parties by allowing them to control key elements of the arbitration process.

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[203] See the discussion of hypothesis testing in: Michael Wood and Christine Welch, 'Are "Qualitative" and "Quantitative" Useful Terms for Describing Research?' (2010) 5 *Methodological Innovations Online* 56, 62-64, 66-67,

[204] Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3 *Groningen Journal of International Law* 110, 122.

The third subsidiary hypothesis follows from the argument that, as a quasi-judicial mechanism for resolving disputes, the legitimacy of arbitration, and hence its acceptability, depend on a just and fair process. The hypothesis, then, is that the SAL 2012 establishes a legal framework that provides sufficient procedural safeguards to ensure a minimally just process. This raises the issue of what constitutes a minimally just process, which will be considered in chapter four as a part of the analysis of the legal frameworks regulating the arbitration tribunal and procedures.

The fourth subsidiary hypothesis flows from the purpose of arbitration, which is essentially to resolve a dispute. The chosen mechanism for this is the arbitration award, which must be an effective award if the dispute is to be resolved. This requires that the award is legitimate, final and enforceable. As noted above, to be legitimate the award must result from a fair and just process. To be final, the award should ideally be the end of the process. To be enforceable, the national courts must have the power to require the relevant party to fulfil any obligations imposed by the award. Thus, the hypothesis is that the SAL 2012 establishes a legal framework that facilitates and supports the arbitration process in making an effective award that resolves the dispute between the parties.

The fifth, and final, subsidiary hypothesis flows from the pragmatics of commercial activity. As explained previously, this requires that any activity should be efficient and provide the best possible value for money. Based on this, the hypothesis is that the SAL 2012 establishes a legal framework that allows the process of arbitration to proceed efficiently and with minimal cost, limiting the opportunity for delaying tactics or any other causes of inefficiency and increased expense.

Before moving on to consider the arguments and structure of the thesis, it should be noted that these hypotheses are not of equal importance. Because they are crucial to the nature of arbitration and its legitimacy, the principles of party autonomy and justice are of prime importance. Of equal importance is the need for arbitration to result in an effective award that resolves the dispute. Cost and efficiency, however,

are pragmatically desirable features of arbitration. While important, they are not essential to the very nature of the process. This means that it is reasonable to treat the fifth subsidiary hypothesis as less important than the other subsidiary hypotheses.

The initial claim that provides the starting point for the analysis in the main body of the thesis is: As part of its vision for modernisation (see 1.3.5), Saudi Arabia needs a legal framework that enables and facilitates ICA to meet the needs of the international commercial community. The SAL 2012, along with the Implementation Regulation of the Arbitration Law 2107 and the Enforcement Law 2012, is intended to provide just such a legal framework. The question is: how well does it fulfil that goal? A complete answer to this question requires a two-stage analysis. In the first stage, the legal framework itself must be assessed to determine how well it provides for the core principles of modern ICA. The second stage requires an empirical analysis to determine the perceptions of the stakeholders and assess whether the new framework adequately meets their needs. Because it would be too large a project for a PhD thesis to tackle both stages, this thesis focuses on the first stage of this process of analysis, which does the groundwork for subsequent empirical research by providing a deep understanding of the legal framework, its strengths and weaknesses. It also provides an opportunity to propose further reforms to the framework, which may also be included in any subsequent empirical analysis.

Before explaining the thesis structure, it should be noted that the approach in this thesis is predicated on a pragmatic view of how arbitration works in practice, rather than on aspirational theories of how arbitration should work in an ideal world. This means that the argument proceeds on the basis that arbitration is dependent on the support of individual states through their national legal systems. For the foreseeable future, arbitration cannot function without being enabled by national law or supported by the national courts. This does not mean that the role of the courts and the use of mandatory rules should not be tightly constrained to allow arbitration to function as far as possible as a private mechanism for dispute resolution, independent of the courts. It does, however, mean that the involvement of the courts and the use of mandatory rules are necessary to enable a legitimate and effective system of

arbitration. While this issue is briefly considered in chapter two, as part of a discussion about conceptual models of arbitration, a full examination of the position adopted here would require its own thesis. Thus, for the purposes of this thesis, the pragmatic reality of arbitration as a system necessarily dependent on national law is preferred to the school of thought that conceptualises the ideal nature of arbitration as an autonomous system, that ought to be independent of national law.[205] All criticisms and proposals rely on this basic attitude towards arbitration as a mechanism for resolving disputes that is necessarily dependent on national law.

This thesis is organised around four central components of the arbitration process: jurisdiction; the arbitration agreement; the arbitration tribunal and proceedings; and the arbitration award. Based on this approach, the thesis is divided into four substantive chapters, along with an introduction and conclusion. Each of the substantive chapters deals with one of those four components. These chapters are divided into two main parts. The first part engages with theoretical issues, identifying and discussing the balance of interests reflected in the core principles of ICA and the role of the national courts. The second part is the comparative legal analysis. In each chapter, the approach taken by the Model Law is explicated as the benchmark for comparison. This is followed by an analysis of the approach under the Scottish Act and the SAR. Finally, the approach taken by the SAL 2012 is compared to both the Model Law and the Scottish approaches. Where appropriate, suggestions are made regarding future reform of the Saudi law.

Chapter two addresses three issues relating to jurisdiction: the legal jurisdiction of the arbitration seat and *lex arbitri*; the arbitration tribunal's jurisdiction to resolve the dispute; and the national court's jurisdiction to determine whether an arbitration

[205] Emmanuel Gaillard, 'The Representations of International Arbitration' (2010) 1 *Journal of International Dispute Settlement* 271, 278; David D Caron, Stephan W Schill, Abby Cohen Smutny and Epaminontas E Triantafilou, 'Practising Virtue: An Introduction' in David D Caron, Stephan W Schill, Abby Cohen Smutny and Epaminontas E Triantafilou (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 1, 3-4. See also: Thomas Schultz, *Transnational Legality: Stateless Arbitration* (Oxford University Press 2014).

award should be enforced. The first substantive section examines theoretical models of arbitration with the aim of using those models as a tool for assessing the approaches taken in practice. The next section analyses the approach taken by the Model Law, Scots Law and the SAL 2012. This analysis is divided into three subsections, explicating the legal rules governing the gateway jurisdiction of the court, the jurisdiction of the arbitration tribunal and the court's jurisdiction regarding the final award. Subsequently, the approaches taken by the Model Law and Scots Law are used as comparators for an assessment of the approach under the SAL 2012.

In this chapter, it is argued that, consistent with the first subsidiary hypothesis, the SAL 2012 makes significant improvements to resolve the jurisdictional criticisms of the previous law. By shifting the jurisdictional balance of the legal framework from an over-reliance on the courts to a system that allows the arbitration tribunal greater authority and independence, the SAL 2012 brings the regulation of arbitration in Saudi in-line with the norms of modern ICA. Providing for the principles of competence-competence and separability reflects a greater respect for party autonomy and the parties' decision to use arbitration to resolve a dispute. Consistent with the main hypothesis, it is further argued that this shift in favour of party autonomy does not unduly impact on justice or cost-effectiveness, resulting in a better overall balance between the three principles. It is, however, suggested that, contrary to the second subsidiary hypothesis, the SAL 2012 could have provided greater respect for party autonomy by allowing the parties greater control over the court's jurisdiction. Furthermore, it is argued that, contrary to the second and fifth subsidiary hypotheses, the SAL 2012 could have been more innovative in utilising mechanisms, such as the arbitration appointment referee under the Scottish Act, to provide greater flexibility and improve the efficiency of the process.

Chapter three considers the arbitration agreement. The first substantive part of the chapter explores the nature, justification and limits of the arbitration agreement. This includes an analysis of the concept of autonomy and its relevance to the arbitration agreement from both western and Islamic perspectives. This theoretical part ends with the construction of a model conception of the arbitration agreement, which provides

a tool for assessing the law in practice in the second half of the chapter. The legal analysis is divided into three preliminary sections, which explicate and compare the approaches taken by the Model Law, Scots Law and the SAL 2012. The arbitration agreement is examined first, followed by the court's role, and then the parties' power to determine the features of the arbitration process. These analyses lead into a discussion of how Saudi law might be improved.

In this chapter, it is argued that, consistent with the first subsidiary hypothesis, the SAL 2012 significantly improves on the previous law by removing the condition of validity that required arbitration agreements to receive judicial approval. It is, however, observed that the SAL 2012 fails to fully define a valid arbitration agreement. This is arguably inconsistent with the first and fifth subsidiary hypotheses: any significant lack of clarity in the law makes it more difficult for the parties to effectively implement their autonomous decision to resolve any dispute by arbitration; and it makes it more likely that an arbitration agreement will be open to challenge as invalid, which would increase the cost of the process and make it less efficient.

It is also noted that the SAL 2012 requires the arbitration agreement to be completed in writing. This is arguably inconsistent with the first and second subsidiary hypotheses, since it negates the parties' intention to arbitrate unless their agreement is formalised in writing, which restricts the parties' freedom to choose the form of the agreement. It is however consistent with the third and fourth subsidiary hypotheses, since a written agreement provides greater evidentiary certainty, which allows for a more effective and just process. This shifts the balance away from party autonomy and towards justice but remains consistent with the main hypothesis. This trend is further reflected in the rules governing the content of an arbitration agreement, which are more restrictive than the equivalent rules found in the Model Law and the SAR. It is further argued, that to improve the consistency of Saudi law with the first, fourth and fifth subsidiary hypotheses, the SAL 2012 should be reformed, following the approach in Scotland, to include a complete set of procedural rules that explicitly label each rule as mandatory or default.

Chapter four analyses the legal rules regulating the arbitration tribunal and the arbitration proceedings. While chapter three primarily focuses on the principle of autonomy, in this chapter the focus is on the principle of justice, particularly on natural and procedural justice. It does, however, also engage with the principle of party autonomy by addressing the appropriate balance between the interests protected by the principle of justice and those protected by the principle of autonomy. Finally, the theoretical part of the chapter also examines the relevance and implications of the rule of law for the arbitration process. The theoretical analysis of the first half is then applied to the comparative analysis of the law, which is explicated in the second half of the chapter. While still following the order of comparison that addresses first the Model Law, followed by Scots law and then the SAL 2012, this part of the chapter is structured around issues relating primarily to justice, but also to party autonomy and cost-effectiveness. The analysis considers, in turn, the legal rules of the arbitration proceedings and the rules governing the arbitration tribunal.

In this chapter, it is argued that, consistent with the third subsidiary hypothesis, the SAL 2012 establishes a legal framework that requires a procedurally just arbitration process. Like the Model Law and the Scottish Act, the SAL 2012 explicitly requires that the parties are treated equally by the tribunal and imposes obligations on the tribunal to ensure that it is impartial and allows all parties the opportunity to state and defend their case. It is further argued that that the framework provided for by the SAL 2012, while a significant improvement over the previous law, imposes more formalities and restrictions on party autonomy than either the Model Law or the Scottish Act. This reflects the trend identified above that, while remaining consistent with the main hypothesis, the SAL 2012 favours a balance in favour of justice over autonomy. As with the analysis of the arbitration agreement, it is again argued that the SAL 2012 could be improved by following the example of the SAR and providing for a complete and accessible set of procedural rules. Furthermore, also following the Scottish approach, it would improve consistency with all the subsidiary hypotheses to allow for the option of using an arbitral appointments referee. It is also suggested that the SAL 2012 should have explicitly provided for default rules regulating confidentiality.

In chapter five, the analysis is focused on the arbitration award, its finality, enforcement and the opportunity for challenge. Again, the chapter is split broadly into two halves. The first half engages with the issues from a general and more theoretical perspective, while the second half then applies the outcome of that initial examination to the comparative legal analysis of the Model Law, the approach under Scots law and the SAL 2012. This part of the chapter is subdivided into specific areas, including: interim awards; the final award; vacating the award; and enforcement.

In this chapter, proceeding through an analysis that engages with moral and legal duties of the arbitrators, it is argued that the SAL 2012 broadly follows the Model Law, reflecting a general, if inconsistent, pro-arbitration approach to the recognition and enforcement of arbitration awards. As in other parts of the legal framework, the approach is consistent with the main hypothesis, with the SAL 2012 achieving an acceptable balance between the core principles. As such, the SAL 2012 precludes a challenge on the merits of the award and only allows a court to set aside the award, or refuse enforcement, where tribunal has exceeded its authority or where there has been a significant breach of procedural or natural justice. The SAL 2012 does, however, give less weight to party autonomy than either the Model Law or the SAR. Consistent with fourth subsidiary hypothesis, and Saudi Arabia's obligations under the NY Convention, the final award is considered *res judicata* and enforceable by the courts.[206] However, inconsistent with the first and second subsidiary hypotheses, the SAL 2012 the court has no power to remit an issue back to the arbitration tribunal and it does not appear to allow the parties the option of challenging an award through an internal arbitration appeal mechanism. Furthermore, there is no option for challenging the award on the grounds of legal error. It is argued that, although this is consistent with the Model Law, it unnecessarily restricts party autonomy, making the SAL 2012 inconsistent with the second subsidiary hypothesis.

[206] SAL 2012, article 52. See also, the Enforcement Law of 2012, article 11.

The thesis ends with chapter six, which draws together the arguments set out in the preceding substantive chapters. As well as briefly summarising the main issues, this chapter considers the strengths and weaknesses of the SAL 2012 as a complete legal framework, combining the sectional analysis into a critique of the statute as a whole. Based on the research presented in this thesis, it is concluded that the SAL 2012 is a significant improvement over the SAL 1983, bringing the Saudi legal framework into line with the norms and expectations of the international arbitration community. It does, however, allow room for further improvement and some future options for reform are proposed.

These proposals, which are mostly drawn from the approach in Scotland, are all predicated on improving the balance between party autonomy, justice and cost-effectiveness, increasing the emphasis on party autonomy without sacrificing the interests of justice. They most notably include proposals for: the inclusion of an article stating the founding principles underlying the law; a comprehensive set of clearly labelled mandatory and default rules of procedure; a greater emphasis on rules establishing the autonomy of the arbitration process and the tribunal's jurisdiction; the inclusion of rules that increase both the respect for party autonomy and the justice of the process by allowing the parties to refer a point of law to the court and also the power to include the option of a legal error challenge to an award; allowing the parties greater control over the composition of the arbitration tribunal, including the default option of using an arbitration appointment referee where the process breaks down; explicit rules governing confidentiality; more explicit provisions regarding the constraints imposed by *Sharia*; allowing the parties the option to use any available internal arbitration appeals process; allowing the courts to refer an issue back to the arbitration tribunal; and ensuring that awards are only set aside where a procedural irregularity has, or will, result in substantive injustice.

1.8 The Limits of the Thesis

The main limitation of this thesis is that it relies exclusively on a text-based analysis. Given the lack of readily available case law on arbitration under the SAL 2012 in

Saudi Arabia, the focus was essentially on the text of the legislation rather than on how the law works in practice. It was possible to obtain limited information of a small number of cases, and these have been used where possible. However, the decision to limit the research to a text-based analysis makes it difficult to assess how successful the legislation will be in practice. This is compounded by the lack of any empirical evidence from other sources regarding the SAL 2012 and the current legal regulation of arbitration in Saudi Arabia. As such, the present thesis provides a valuable critique of the legal framework in theory, but empirical research is required to further understand how well the law works in practice.

The text-based focus of the present research also impacts on the proposals that have been made consequential to the analysis. As with the primary analysis of the SAL 2012, and while the proposals are justified in theory, the lack of empirical research means that their acceptability remains untested. The next step following the research presented in this thesis should be to carry out empirical analyses to determine the attitudes of various stakeholder to both the SAL 2012 and to the proposals suggested as part of this thesis.

The other main limitation arises from the decision to rely on two comparators for the comparative analysis. The decision was motivated by the goal of achieving a deeper comparison than would be possible with more comparators. However, the disadvantage of such an approach is that it limits the range of different options that may usefully inspire criticisms of the SAL 2012 and proposals for reform. Again, this limitation provides scope for future research that uses different comparators or adopts a different approach that focuses on breadth, rather than depth, by using a larger number of comparators.

As a final limitation, it might also be observed that the decision to structure the research by focusing on the four main elements of arbitration necessarily shapes the analysis and influences the outcome of that analysis. An approach that was structured

around the three core principles, rather than the elements of the arbitration process, may have resulted in a substantially different analysis.

1.9 Conclusion

This introductory chapter has set out the research question, the background context, the methodologies and research methods, and the structure of the thesis. The research question asks how well the SAL 2012 facilitates an arbitration process that reflects the demands of modern ICA. It was explained that the assessment of the SAL 2012 involved a comparison with the Model Law and the Scottish Act. The primary *tertium comparationis* for this comparative analysis was the implementation, through the legal rules, of the core principles of party autonomy, justice and cost-effectiveness. The secondary point of comparison was the relationship between arbitration and the national courts.

The background context for the research presented in this thesis, is the troubled recent history of international arbitration in Saudi Arabia. As exemplified by the *Aramco* arbitration in 1963, the prioritisation of Western legal principles resulted in a reluctance to engage with international arbitration. Attitudes changed in the 1980s as international commerce became increasingly important, resulting in the SAL 1983. Although providing a modern legal framework, it was criticised for the limits it imposed on party autonomy and for maintaining a supervisory role for the courts, which resulted in delays and an excessive interference with the arbitration process. The SAL 2012 was passed with the aim of addressing these criticisms by creating a legal framework more consistent with the norms of ICA, making Saudi Arabia a commercially attractive option.

The research question was designed to assess how well the SAL 2012 succeeds in the creation of a legal framework suitable for modern ICA. Based on a critical realist paradigm, the research method was a critical, interpretative analysis of text-based sources of information applying a mixed comparative legal methodology, including

both doctrinal and normative elements. As explained, the thesis is divided into four key components of the legal framework for regulating the arbitration process: chapter two considers issues of jurisdiction; chapter three examines the arbitration agreement; chapter four focuses on the arbitration tribunal and the arbitration proceedings; and chapter five, addresses the arbitration award, challenges to the award and enforcement of the award. This analysis is drawn together in chapter six, which sets out the final conclusions and proposals for reform.

To conclude, then, the research methodology and methods explained in this introductory chapter are designed to address the specific issue targeted by the research question. As noted above, this asks how effectively the SAL 2012 provides a legal framework that, more appropriately than the SAL 1983, balances the interests protected by the three core principles of modern ICA. As reflected in the structure of the thesis, the methodological approach facilitated a systematic comparative analysis of the SAL 2012, which allowed identification of its strengths and weakness and opportunities for future reform.

Chapter Two: Examination of the Core Principles in the Context of Jurisdiction

2.1 Introduction

Although it has been claimed that 'the foundation of jurisdiction is physical power',[207] it is perhaps better to treat the basis of jurisdiction as a matter of 'legitimate authority'.[208] It is not that power is irrelevant, but that it is relevant in the normative sense of legitimate authority,[209] rather than in the descriptive sense of ability. Relying on this distinction, jurisdiction may be defined as: 'the power to hear and determine the subject matter in a controversy between parties'.[210] Jurisdiction is essentially concerned with determining the tribunal empowered to resolve the dispute, rather than with the substantial merits of the case or its admissibility.[211] Although it might be argued that a bright-line distinction between these issues is artificial,[212] the question of jurisdiction is nevertheless an important practical consideration.

The issue of jurisdiction impacts on several different aspects of the arbitration process. Even before arbitration begins, the issue of jurisdiction may affect whether it can proceed without an initial court referral.[213] Jurisdiction is, of course, central to the existence and scope of the tribunal's authority to decide a case or issue. It is,

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[207] *McDonald v Mabee*, 243 US 90, 91 (1915) per Justice Holmes.

[208] Evan Tsen Lee, 'The Dubious Concept of Jurisdiction' (2003) 54 *Hastings Law Journal* 1613, 1620.

[209] Scott Dodson, 'In Search of Removal Jurisdiction' (2008) 102 *Northwestern University Law Review* 55, 59; Howard, M. Wasserman, 'Jurisdiction, Merits and Procedure: Thoughts on Dodson's Trichotomy' (2008) 102 *Northwestern University Law Review Colloquy* 215.

[210] *Rhode Island v Massachussets* 37 US (12 Pct) 657, 718 (1838), US Supreme Court.

[211] Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen (ed), *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC Publishing 2005) 601.

[212] Evan Tsen Lee, 'The Dubious Concept of Jurisdiction' (2003) 54 *Hastings Law Journal* 1613, 1625.

[213] Luca Radicati Di Brozolo, 'International arbitration and domestic law' in Giuditta Cordero-Moss (ed) *International Commercial Arbitration: Different Forms and their Features* (Cambridge University Press 2013) 40, 43.

however, also relevant beyond the restricted question of whether the arbitration tribunal has jurisdiction in any particular case. Indeed, it is possible to identify three senses in which jurisdiction is relevant. First is jurisdiction in the sense of legal jurisdiction of the arbitration seat, and the attendant *lex arbitri*; second is jurisdiction in the sense of the arbitration tribunal's jurisdiction to decide the case; and the third sense of jurisdiction relates to whether a court has the authority to determine the enforceability of an arbitration tribunal's decision.[214]

All three senses of jurisdiction raise important issues, particularly in relation to individual and party autonomy. Determining the legal jurisdiction and the applicable *lex arbitri* establishes the legal framework for arbitration, which shapes all aspects of the process of arbitration.[215] Appropriately affording an arbitration tribunal the authority to determine the dispute is fundamental to a respect for party autonomy, which is embodied in the agreement to arbitrate the dispute. Ensuring that an award is enforceable is crucial to the effectiveness of arbitration, as well as a matter of procedural justice. In this regard, jurisdiction is relevant to the question of whether a vacated award is nonetheless enforceable.[216] Furthermore, jurisdiction is germane to the protection afforded by the NY Convention, which may or may not have been implemented by the state in which the relevant assets are located.

For the state, attracting lucrative arbitration business may influence the development of legal rules and standards that promote the legal jurisdiction as favourable to one or both of the parties involved.[217] Historically, this is reflected in the developments

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[214] See, eg, *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, UK Supreme Court.

[215] Luca Radicati Di Brozolo, 'International arbitration and domestic law' in Giuditta Cordero-Moss (ed) *International Commercial Arbitration: Different Forms and their Features* (Cambridge University Press 2013) 40, 43.

[216] See, Christopher R. Drahozal, 'Enforcing Vacated International Arbitration Awards: An Economic Approach' (2000) 11 *The American Review of International Arbitration* 451.

[217] Christopher R. Drahozal, 'Enforcing Vacated International Arbitration Awards: An Economic Approach' (2000) 11 *The American Review of International Arbitration* 451, 458.

following the introduction of the NY Convention in 1958, which was created to overcome the deficiencies of the Geneva Convention on the Execution of Foreign Arbitral Awards 1927.[218] Since then, states have increasingly relaxed their approach by affording greater respect to party autonomy and restricting the power of the courts to control the arbitration process and outcome.[219] This trend has been encouraged by the protections afforded by the NY Convention, which allows parties to choose arbitration friendly states, such as France and Switzerland. To remain competitive, other states have subsequently followed suit.[220] More recently, the Model Law 1985, amended in 2006, has also been hugely influential in furthering the relaxation and harmonisation of arbitration regimes.[221] Indeed, as far back as 1995, it was observed that: 'the impact of the Model Law is such that no State, modernizing its arbitration law will do so without taking it … into account'.[222]

This relaxation has not wholly excluded the role of national courts, which still varies significantly between states. Since the Arbitration Act 1996 in England, and the Arbitration (Scotland) Act 2010 in Scotland, these countries are more attractive as seats of arbitration when compared to countries with less liberal approaches, such as Saudi Arabia under the previous regime governed by the SAL 1983. However, as developments in Brazil illustrate, 'given the right climate, progress can rapidly occur',

[218] Parasitic on the Geneva Protocol on Arbitration Clauses 1923.

[219] Luca Radicati Di Brozolo, 'International arbitration and domestic law' in Giuditta Cordero-Moss (ed) *International Commercial Arbitration: Different Forms and their Features* (Cambridge University Press 2013) 40, 41.

[220] Luca Radicati Di Brozolo, 'International arbitration and domestic law' in Giuditta Cordero-Moss (ed) *International Commercial Arbitration: Different Forms and their Features* (Cambridge University Press 2013) 40, 47.

[221] Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (Student Version) (5th ed OUP 2009) 69-70.

[222] Pieter Sanders, 'Unity and Diversity in the Adoption of the Model Law' (1995) 11 *Kluwer Law International* 1.

and countries previously seen as unfriendly may become attractive as arbitration seats. [223]

In exploring the importance of jurisdiction in the context of ICA, several relevant issues will be discussed, including: the process of determining jurisdiction and the role of the parties; the competence-competence principle; the doctrine of separability; the courts' authority to review the arbitrator's decision; and the jurisdictional issues affecting the enforcement of an award. The aim of the chapter, having regard to the three core principles of autonomy, justice and cost-effectiveness, is to carry out a comparative analysis of how well the SAL 2012 regulates these jurisdictional issues, identifying opportunities for reform. The analysis begins by examining the concept of jurisdiction in the context of arbitration,[224] and by considering the relevance of theoretical models of arbitration. These models are used to facilitate a critical assessment of the relevant provisions of both the Model law and the Scottish Act. That analysis is further informed by reference to the law of other countries, such as England, where the Model Law has not been implemented. The analyses of the Model Law and the Scottish Act subsequently provides the benchmark for a critical comparison of the SAL 2012. The chapter ends by considering possible reforms.

2.2 Jurisdiction and Theoretical Approaches to Arbitration

It is not uncommon for an alleged party to an ICA agreement to challenge the agreement by raising a jurisdictional issue. This is important because ensuring that the dispute is resolved by the appropriate forum impacts on both party autonomy and procedural justice. It is also important for two pragmatic reasons. First, it is costly, and time consuming. Second, if the issue is not appropriately resolved then it may lead to a subsequent challenge to the enforceability of any award made by the

[223] Luca Radicati Di Brozolo, 'International arbitration and domestic law' in Giuditta Cordero-Moss (ed) *International Commercial Arbitration: Different Forms and their Features* (Cambridge University Press 2013) 40, 47.

[224] See, Mitchell, L. Lathrop, 'Jurisdiction in International Arbitration' (2011) 2 *The Global Business Law Review* 29.

arbitrators.[225] This follows because the legitimacy of the tribunal's decision and the award crucially depends on whether the tribunal has the requisite authority or jurisdiction. The relevance of jurisdiction, however, goes beyond the narrow territory of the arbitration tribunal and engages wider issues of procedural justice. Ensuring that justice is done is the prerogative of the state and, along with sovereignty concerns, justify the state's involvement in maintaining a degree of control.

The 'fundamental' importance of jurisdiction,[226] then, is that it determines the existence and extent of a court or tribunal's legitimate authority to determine any particular case and make an enforceable award. In the absence of jurisdiction, a court or tribunal is 'as impotent as a morning mist',[227] and where a court or tribunal exceeds its jurisdiction then the relevant decision will be considered unjust and declared void.[228] Thus, it is essential to determine whether jurisdiction lies with the arbitration tribunal, the national domestic courts or both forums.

Although the requirement of relevant jurisdiction applies to both the national courts and the international arbitration tribunals, there is a crucially important distinction to be made. While the jurisdiction of national courts is determined solely by the state, the jurisdiction of the arbitration tribunal is, in principle, necessarily dependent on party autonomy,[229] since it derives from the parties' consent to the agreement.[230] The

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[225] John Yuko Gotanda, 'An Efficient Method for Determining Jurisdiction in International Arbitrations' (2001) 40 *Columbia Journal of Transnational Law* 11, 12-13.

[226] *Mavrommatis Palestine Concession Case* (*Greece v UK*) (1924) PCIJ A2 60 <http://www.worldcourts.com/pcij/eng/decisions/1924.08.30_mavrommatis.htm> accessed 30 November 2017.

[227] *French Company of Venezuelan Railroads Case* (1905) Ralston's Report 367, 444, as quoted in Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 2006), 259.

[228] See, the *Orinoco Steamship Company* (1910) 1 HCR 504, 505.

[229] Leila Vafaeian, 'Public Policy v. Party Autonomy in International Commercial Arbitration' (PhD Thesis, University of Newcastle 2016), 30.

[230] *Minority Schools in Upper Silesia* (1928) PCIJ A 15, 22-23. See also, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press

effect of consent is to alter the rights and duties of the parties to that agreement, such that neither party should be allowed to unilaterally renege on the agreement without some lawful justification.[231] This means that, where consent is deficient or absent, then the tribunal's jurisdiction is undermined and open to challenge,[232] but where jurisdiction is conferred by the parties' valid consent, then, at least in theory, 'neither party may subsequently challenge the tribunal's competence'.[233]

Before examining the law in practice, four theoretical models of ICA will be considered. These models provide the necessary tools to facilitate a deep comparative analysis of the approach to jurisdiction under the SAL 2012. As Gaillard notes, the answer to any technical question, 'ultimately depends on the underlying vision one entertains of international arbitration'.[234] This avoids presupposing any particular approach to arbitration and recognises that different philosophies of arbitration may impact on any proposed reforms.

Although Gaillard has usefully constructed theoretical models of ICA based on the national-international axis,[235] for the purposes of this thesis, the focus will be on four competing models that centre more directly on the conceptual nature of arbitration. These are the contractual, jurisdictional, hybrid (contract and jurisdiction), and autonomous models.[236] The value of these models, for this thesis, is that they

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2006), 262; Zheng Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014), 1-3.

[231] M. Gilbert, 'agreements, coercion and obligation' (1993) 103 *Ethics* 679, 691-3.

[232] Giuditta Cordero-Moss, 'Limits on Party Autonomy in International Commercial Arbitration' (2015) 4 *Penn State Journal of Law and International Affairs* 186, 188.

[233] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 2006), 266.

[234] Emmanuel Gaillard, 'The Representations of International Arbitration' (2010) 1 *Journal of International Dispute Settlement* 271-281, 272.

[235] Emmanuel Gaillard, 'The Representations of International Arbitration' (2010) 1 *Journal of International Dispute Settlement* 271.

[236] Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1 *Contemporary Asia Arbitration Journal* 257.

differentially emphasise key principles underlying ICA, highlighting their relevance to alternative structural arrangements. Thus, while the contractual model prioritises party autonomy, the jurisdictional model is more concerned with the legitimacy inherent to a formal, procedurally just system. The hybrid model dialectically resolves the conflict between the contractual and jurisdictional models by emphasising the importance of both party autonomy and justice. Like the hybrid model, the autonomous model emphasises both party autonomy and justice by characterising the system of ICA as a transnational system of justice,[237] wholly independent of any national legal system.

Under the contract model, the arbitration tribunal's authority derives from the agreement between the parties to submit to arbitration and exclude recourse to litigation. The arbitration process and award are a series of contractual acts enjoying the same light-touch relationship with national law as any other contract.[238] While this has the advantage of reflecting the contractual nature of the relationship between the parties,[239] it is problematic because it fails to reflect the independent nature required of the arbitration tribunal. It also fails to explain the partial or complete immunity granted to arbitrators.[240] Furthermore, it cannot explain the enforceability of an award, beyond simply invoking a breach of the arbitration agreement.[241] In this regard, the contract model may be considered an idealised view of arbitration where

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[237] David D Caron, Stephan W Schill, Abby Cohen Smutny and Epaminontas E Triantafilou, 'Practising Virtue: An Introduction' in David D Caron, Stephan W Schill, Abby Cohen Smutny and Epaminontas E Triantafilou (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 1, 3-4.

[238] Julian DM Lew, *The Applicable Law in International Commercial Arbitration* (Oceana Publications 1978), 55-56.

[239] *Cie Europeenne de Cereals SA v Tradax Export SA* [1986] 2 Lloyds Rep 301.

[240] See, eg, *Sutcliffe v Thackrah* [1974] AC 727, 737-738, House of Lords. See also, Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1 *Contemporary Asia Arbitration Journal* 257, 270.

[241] Alexander J Belohlavek, 'The Legal Nature of International Commercial Arbitration and the Effects of Conflicts Between Legal Cultures' (2011) 2 *Law of Ukraine* 19.

all parties to the dispute are perfectly cooperative and seek only to gain the truth of the contract with little need for the support or supervision of national law.[242]

Under the jurisdiction model, arbitration is analogous to litigation, with the arbitrators deriving their authority from the state rather than party autonomy.[243] The strength of this model is that it recognises the dependence of the arbitration process on the state's recognition of the legitimacy of the process and its willingness to recognise and enforce an award.[244] The model's weakness is that it underplays the importance of the arbitration agreement in affording the arbitration tribunal its jurisdiction to determine the dispute. As such, while reflecting the reality that 'it is the place of the [arbitration] proceedings whose law defines the scope of ... contractual autonomy' embodied in the arbitration agreement,[245] it diminishes the role of party autonomy.

The hybrid model tries to combine the strengths of both the contractual and the jurisdictional models, while eliminating their weaknesses. As such it recognises both the importance of party autonomy in opting to submit a dispute to arbitration and the need to situate that process within the jurisdiction of a legal framework. The process begins, consistently with a contractual model, by virtue of an arbitration agreement between the parties. Then, more consistent with the jurisdictional model, it follows a process bound by the procedural law and public policy of the seat and ends with a quasi-legal judgment making a legally enforceable award.[246]

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[242] Alexander J Belohlavek, 'The Legal Nature of International Commercial Arbitration and the Effects of Conflicts Between Legal Cultures' (2011) 2 *Law of Ukraine* 26.

[243] Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1 *Contemporary Asia Arbitration Journal* 257, 261.

[244] Alexander J Belohlavek, 'The Legal Nature of International Commercial Arbitration and the Effects of Conflicts Between Legal Cultures' (2011) 2 *Law of Ukraine* 21.

[245] Alexander J Belohlavek, 'The Legal Nature of International Commercial Arbitration and the Effects of Conflicts Between Legal Cultures' (2011) 2 *Law of Ukraine* 24

[246] See Pieter Sanders, 'Trends in International Commercial Arbitration' (1975) 145 *Recueil Des Cours* 205, 233-34.

The autonomous model 'treats arbitration as *sui generis* proceedings which cannot be automatically subjected either to the application of general contractual principles or to the rules regulating civil proceedings in courts of law'.[247] Under this model, 'parties should have unlimited autonomy to decide how the arbitration shall be conducted', unrestrained by the law of the arbitration seat.[248] It supports a delocalised approach to arbitration, maintains that the national laws of the seat should not play any supervisory role and insists that arbitrators should be entirely free to choose the applicable system of law or principles.[249]

These models essentially represent a tension between party autonomy and the procedural justice ensured by the national legal structure. This reflects a payoff necessary to ensure that arbitration provides an 'effective ... and attractive alternative to litigation, while still ensuring that its use is predicated on the consent of the parties'.[250] In creating or adopting a single model of arbitration with which to critique the law, the two issues of party autonomy and the procedural justice enabled through state supervision must be balanced. But this balance should nevertheless prioritise the basic idea of arbitration. This is that the parties are seeking to manage a broken relationship by voluntarily agreeing on the mechanical process by which the substantive dispute may be justly resolved. In other words, the administrative function of arbitration should be dominant to the legislative support necessary to ensure its efficient and effective functioning.[251] In this regard it might be better to see the

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[247] Alexander J Belohlavek, 'The Legal Nature of International Commercial Arbitration and the Effects of Conflicts Between Legal Cultures' (2011) 2 *Law of Ukraine* 26.

[248] Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1 *Contemporary Asia Arbitration Journal* 257.

[249] Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1 *Contemporary Asia Arbitration Journal* 257, 280-281.

[250] George A. Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2012) 37 *The Yale Journal of International Law* 1, 2.

[251] See, Kenneth S. Carlston, 'Theory of Arbitration Process' (1952) 17 *Law and Contemporary Problems* 631, 648.

balance as between cost-effectiveness and procedural justice, bearing in mind the 'fundamental' importance of party autonomy.[252]

Arbitration may be characterised as a 'private form of justice',[253] which respects the autonomy of the parties by giving effect to their respective wills through the agreement to submit their dispute to arbitration. In an ideal world, this would be achieved entirely within an autonomous system of arbitration. All aspects of the process would be determined by the parties and there would be no need to rely on national law or have recourse to a court.[254] Realistically, however, arbitration needs the state's support to function effectively.[255] As Kerr LJ stated:

> [d]espite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law.[256]

Although this dictum referred to English law, national law is currently an essential part of any system of arbitration.[257] This is partly because the individual parties may fail to effectively exercise their autonomy to sufficiently determine all the relevant

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[252] Hemant Garg and Sushil Gupta, 'Issues Pertaining to International Arbitrations Under The Private International Law' in Ramandeep Kaur Chhina (ed) *4th Academic International Conference on Interdisciplinary Legal Studies: 2016 (Boston) Conference Proceedings* (FLE Learning Ltd 2016) 64; George A. Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2012) 37 *The Yale Journal of International Law* 1, 50.

[253] Emmanuelle Gaillard, 'Sociology of international arbitration' (2015) 31 *Arbitration International* 1, 4.

[254] Ar Gor Seyda Dursun, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of its Role and extent' (2012) 1 *Yalova Universitesi Hukuk Fakultesi Dergisi* 161, 163.

[255] Kenneth S. Carlston, 'Theory of Arbitration Process' (1952) 17 *Law and Contemporary Problems* 631, 635; Jan K Schaefer, 'Court Assistance in Arbitration – Some Observations on the Critical Stand-by Function of the Courts' (2016) 43 *Pepperdine Law Review* 521.

[256] *Bank Mellat v Helliniki Techniki SA* [1984] 1 QB 291, 301.

[257] Donald Francis Donovan, 'The Transnational Advocate' in Albert Jan Van Den Berg (ed) Arbitration Advocacy in Changing Times (Kluwer Law International 2011) 3, 3-5; Emmanuel Gaillard, 'International Arbitration as a Transnational System of Justice', in Albert Jan Van Den Berg (ed) *Arbitration - The Next Fifty Years* (Kluwer Law International 2012) 66, 69.

aspects of the arbitration process. The backing of national law may also be necessary where one of the parties challenges the process of arbitration. Furthermore, winning an arbitration award would be a Pyrrhic victory in the absence of the enforcement mechanisms provided by national legal systems.[258] It is, however, because ICA is situated within an international matrix of national legal systems that jurisdictional issues arise. Although any pure system of arbitration is likely to remain a utopian ideal, it is nevertheless useful to consider the characteristics of such as system in critiquing or constructing a system in practice.

A perfect system of ICA would provide the parties with a dispute resolution forum acceptable to both parties. The forum would need to be independent of either party, have the authority to determine the dispute and make an enforceable award. Given that the context is arbitration rather than mediation, there would need to be some system for challenging or appealing a decision. This might be theoretically possible within an autonomous system of arbitration, but in the real world it will not be feasible without the support of individual states.[259] Since national legal systems are already well established and capable of providing support, it seems unlikely that there would be sufficient motivation for states to support a self-contained, independent system of arbitration. Especially when, at least for ICA, any such support would need to be transnational, or multinational at least. Having said that, the involvement of a national legal system is a matter of degree and the pragmatic ideal would be to have a system where the level of involvement of the national legal system is the minimum necessary to achieve an appropriate balance between cost-effectiveness and procedural justice.[260] In other words, the pragmatic compromise must be a hybrid system that, within the constraints of any national legal system, aims to support, promote and

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[258] Alexander J Belohlavek, 'The Legal Nature of International Commercial Arbitration and the Effects of Conflicts Between Legal Cultures' (2011) 2 *Law of Ukraine* 27.

[259] Chinwe A Mordi, 'An Analysis of National Courts Involvement in International Commercial Arbitration; Can International Commercial Arbitration be Effective without National Courts?' (2016) 6 *Open Journal of Political Science* 95, 103.

[260] George A. Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2012) 37 *The Yale Journal of International Law* 1, 50.

protect the core principles of party autonomy, justice and cost-effectiveness, which underpin an idealised autonomous system of ICA.

Since the support for arbitration varies from state to state, the first issue for the parties is to select both the venue and seat. The question then will be how far the state in which the seat is situated will, through the *lex arbitri*, facilitate or restrict the autonomy of both the parties and the process of arbitration.[261] In addition, as an issue of justice, it will be important to appreciate the level of protection provided where one of the parties seeks to challenge the process. Even when a seat has been selected, the jurisdiction of the national legal system may be engaged where there is a disagreement over the seat, which raises the question of the limits to the court's authority to determine the issue.[262] The courts may also be engaged where one party seeks to enforce an arbitration agreement while the other party seeks to litigate. Here the court may be asked to address the question of whether there is a valid and enforceable arbitration agreement.[263] How the national law and courts deal with this 'gateway' issue is crucial to the overall success of the support provided by the state to ICA.[264]

The next issue is the authority of the tribunal. In an autonomous system of arbitration, and respecting the autonomy of the parties who have chosen arbitration, the tribunal will have the authority to determine its own jurisdiction to decide the dispute, subject perhaps to a supervisory transnational arbitration body. In practice, however, any such supervision will be provided by the national legal system. This raises the question of the court's jurisdiction to engage with the issue of the tribunal's

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[261] Ar Gor Seyda Dursun, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of its Role and extent' (2012) 1 *Yalova Universitesi Hukuk Fakultesi Dergisi* 161, 171.

[262] *DaPuzzo v Globalvest Management Company LP* 263 F Supp 2d 714 (SDNY 2003).

[263] Mitchell L. Lathrop, 'Jurisdiction Issues in International Arbitration' (2011) 2 The Global Business Law Review 29, 30.

[264] George A. Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2012) 37 *The Yale Journal of International Law* 1, 2.

jurisdiction. This may relate to the arbitration as a whole, or to whether the tribunal exceeded its authority by addressing disputes that were not arbitrable, either because they fell outside the arbitration agreement or for reasons of public policy.

As Paulson notes, national laws may allow legal appeals to all arbitration decisions, prohibit arbitration in certain contexts, for certain issues or even completely prohibit arbitration, but that is 'emphatically not the modern trend'.[265] This then raises the question of how far the jurisdiction of the courts extends to reviewing the decisions of an arbitration tribunal. The ideal would be that all issues are determined within the arbitration framework, but the pragmatic compromise, reflecting the hybrid model, is that issues of procedural justice are overseen by the courts.

Once a decision has been made, the final issue is enforceability, which secures the value of the award. Under the ideal model, the award would be enforceable through the authority of a transnational arbitration body, without reliance on the national courts. Pragmatically, however, the national courts may be required to enforce an award. The issue is how far national law facilitates the arbitration process, respecting party autonomy and the substantive justice of the award by enforcing or refusing to enforce an award.[266]

Since national law plays such an important role, it is crucial that the parties choose a seat that appropriately balances the interests of party autonomy, justice and cost-effectiveness.[267] In achieving that balance, the role of the courts should be limited, focusing on enabling arbitration and reinforcing its legitimacy. The question of how

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[265] Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen (ed), *Global Reflections on International Law Commerce and Dispute Resolution* (ICC Publishing 2005) 601.

[266] Zheng Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014), 224.

[267] Ar Gor Seyda Dursun, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of its Role and extent' (2012) 1 *Yalova Universitesi Hukuk Fakultesi Dergisi* 161, 180.

well the SAL 2012 regulates the role of the courts and the tribunal's jurisdiction will now be assessed by comparison with the approach under the Model Law and Scots law.

2.3 The Law Governing Jurisdictional Issues in Arbitration

2.3.1 Approaches to arbitration

It was argued above that, while the ideal of arbitration is an autonomous transnational system, the pragmatic reality is that ICA essentially depends on national law. Kerr LJ, extra-judicially, described the relationship between the courts and arbitration as a 'partnership',[268] but it is a partnership of necessity rather than consent. It is crucial, if arbitration is to retain the features that make it a viable alternative to litigation, that the role of the courts is carefully circumscribed. With that in mind, the way in which the Model Law defines the jurisdictional boundaries of the courts and the arbitration tribunal will be examined.

As a compromise aimed at producing international harmonisation,[269] the Model Law brings the advantages of consistency and predictability at the expense of choice. The key issue here is how that compromise impacts on the balance between the independence of the arbitration process and the jurisdiction of the courts. A good starting point is article 5, which prescribes that: 'In matters governed by this Law, no court shall intervene except where so provided by this Law'. This mandatory provision,[270] which is 'critical to the structure of the Model Law',[271] sets the tone that the courts' authority is to be restrictively determined. It provides predictability by

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[268] Lord Justice Kerr, 'Arbitration and the Courts - the UNCITRAL Model Law' (1984) 50 *Arbitration* 3, 5.

[269] Lord Justice Kerr, 'Arbitration and the Courts - the UNCITRAL Model Law' (1984) 50 *Arbitration* 3, 7.

[270] *Noble China Inc v Lei Kat Cheong* (1998) 42 OR (3d) 69 (ON SC, Canada).

[271] New Zealand Law Commission, *Arbitration*, Report R20, (1991), [293].

limiting judicial interference,[272] while allowing the courts to support the arbitration process.[273]

The strength of article 5 lies in its clarity and in the creation of a blank canvas with which to carefully delineate the court's jurisdiction, permitting its involvement only when necessary to ensure a just and cost-effective arbitration process. Any controversy arises not because of article 5 in isolation, but because of its effect on national jurisprudence when combined with the limits set on the court's jurisdiction by the other substantive provisions of the Model Law.[274] Crucially, much depends on how the Model Law is implemented and varying the terms of its provisions may have significant effect. Consider for example, s.1(c) of the English Act, which is broadly equivalent to article 5. Here, s.1(c) replaces the mandatory directive of article 5 - that no court 'shall intervene' - with the instruction that the court 'should not intervene', allowing a discretion unavailable under the Model Law.[275]

Before moving on, it is also worth noting the importance of the place, or seat, of arbitration as a limiting factor on the court's jurisdiction.[276] Under article 1(2):

> The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

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[272] See, eg *Quintette Coal Limited v Nippon Steel Corp* [1991] 1 WWR 219; [1990] BCJ No 2241 (BC CA, Canada)

[273] *China Ocean Shipping Co Owners of the M/V Fu Ning Hai v Whistler International Ltd Charters of the M/V* Fu Ning Hai [1999] HKCFI 693 (HC, Hong Kong); Jan K Schaefer, 'Court Assistance in Arbitration – Some Observations on the Critical Stand-by Function of the Courts' (2016) 43 *Pepperdine Law Review* 521, 534.

[274] See the discussion in: Lord Justice Kerr, 'Arbitration and the Courts - the UNCITRAL Model Law' (1984) 50 *Arbitration* 3, 12-13.

[275] Peter Aeberli, 'Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map' (2005) 21 Arbitration *International* 253, 276.

[276] Tomas Kennedy-Grant QC, 'The Role of the Courts in Arbitration Proceedings', A paper presented at the UNCITRAL-SIAC Conference, Singapore, Sept 2005.

The general effect is to limit the application of the Model Law where the arbitration seat has not been determined or has been established in a foreign state that has not adopted the Model Law.[277]

Turning now to Scots law. The Scottish Act has moved Scots law on ICA away from a total reliance on the Model Law[278] and what was considered an incomplete regulatory framework.[279] To provide a comprehensive modern statute that would help to make Scotland an attractive location for ICA, the Act retained a strong connection with the Model Law, but also drew on the English Act and an earlier draft Bill from 2002.[280] As Lord Glennie commented:

> rather than simply applying the provisions of the Model Law *en bloc* to arbitrations in Scotland, it follows the [English] approach … setting out … a tailor made set of provisions covering all stages of the arbitral process in a Convention compliant way.[281]

The whole tenor of the Policy Memorandum suggests that the primary objective was to provide cost-effective arbitration services that could compete in the world market for arbitration business. However, the Memorandum also emphasises the importance of ensuring 'fairness and impartiality'.[282] In part, this was to be achieved by limiting access to the courts and replicating the approach in Singapore, where the jurisdiction of the courts is essentially supportive and interference with the process of arbitration strictly limited.[283] The issue then, is whether these policy objectives have significantly

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[277] CLOUT case No 13, *Deco Automotive Inc v GPA Gesellschaft für Pressenautomation mbH*, 27 October 1989 (ON District Court, Canada).

[278] Under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 66 and Sch 7.

[279] *Arbitration (Scotland) Bill: Policy Memorandum*, 29 January 2009, [50-54].

[280] *Arbitration (Scotland) Bill: Policy Memorandum*, 29 January 2009, [57].

[281] *Arbitration Application (No 3 of 2011)* [2011] CSOH 164, [2].

[282] *Arbitration (Scotland) Bill: Policy Memorandum*, 29 January 2009, [26].

[283] *Arbitration (Scotland) Bill: Policy Memorandum*, 29 January 2009, [37], [43].

affected the jurisdictional matters considered in this chapter. Is the balance between the jurisdiction of the courts and the jurisdiction of the arbitration tribunal any better than the balance achieved under the Model Law?

Perhaps the first point to make is that article 5 of the Model Law is incorporated as a founding principle, but with a similar modification to that found in the English Act.[284] Incorporating the provision as a 'founding principle', emphasises its importance, but, as noted earlier, by requiring that 'the court should not intervene ... except as provided by this Act', the courts are left with a discretion that is precluded by the Model Law's use of the mandatory imperative 'shall'. Section 1(c) is bolstered by s.13(1), which explicitly sets out the limits to the court's jurisdiction to intervene, making it clear that 'legal proceedings are competent ... only as provided for' by the applicable arbitration rules or 'any other provision' of the Act.

As will be discussed further below, both the Model Law and the Scottish Act implement a hybrid model of arbitration. This is understandable because such a model allows a regulatory framework that best suits the needs of all relevant stakeholders, which include the businesses, the state, the arbitration community and the legal system. Their interests require an arbitration system that provides an appropriate balance of key features such as: cost-effectiveness; respect for party autonomy; independence of the arbitration system; just protection for the parties' interests; legitimacy; and attractiveness to the international business community.

While these features are not mutually exclusive nor are they entirely consistent with each other. For example, ensuring a just and legitimate system impacts on the cost, efficiency and independence of the arbitration process. This means that the features must be balanced according to their relative importance, which is likely to vary from state to state and is reflected in the differences between the Model Law and the

[284] Scottish Act, s 1(c).

Scottish Act. Nevertheless, both share a core philosophy of arbitration, which is apparent in the central features of their respective regulatory frameworks. In the analysis that follows, the approach under the SAL 2012 will be compared with those two frameworks.

As should be expected in an Islamic country, the provisions must be interpreted and applied in a way that is consistent with *Sharia*. This may partly explain why, although 'largely derived from the ... Model Law',[285] the SAL 2012 has not implemented article 5 of the Model Law, which means the courts are not restricted to interventions solely based on its provisions. This is relevant to the Law of Enforcement 2012, which will be considered later. However, it also leaves scope for the courts to intervene more than would be strictly warranted under the SAL 2012.

It might have been better had the SAL 2012 followed the Scottish Act, which includes a modified version of Article 5 permitting the courts only very limited discretion to look outside the Act. Including this restriction - especially in the context of a 'Founding principle' - sets the tone and encourages the courts to develop a culture of minimally interventional support for arbitration. Given that one of the major criticisms of the SAL 1983 was that it allowed too much judicial intervention,[286] it is unfortunate that the SAL 2012 does not follow the Scottish approach, which would have encouraged a more pro-arbitration culture within the legal system. However, despite this flaw, the SAL 2012 provides a more comprehensive system of regulation than under the SAL 1983, applying to any arbitration proceedings in Saudi, and to proceedings abroad where the parties agree.[287]

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[285] Mohammed Al-Hoshan, 'The New Saudi Law in Arbitration: Presentation and Commentary' (2012) 4 *International Journal of Arab Arbitration* 5, 9.

[286] Faisal M Al-Fadhel, 'The Role of the Saudi Courts in the Arbitration Process' (2010) 2 *International Journal of Arab Arbitration* 45, 68-69.

[287] SAL 2012, article 2.

2.3.2 The court's gateway jurisdiction

A key jurisdictional issue arises where litigation is initiated, but a party requests that the matter be referred for arbitration pursuant to an alleged agreement. Consider, first, how the Model Law deals with this issue. Article 8 of the Model Law seeks to protect 'the arbitral process from unpredictable or disruptive court interference' by providing that the court:[288]

> shall ... refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

When coupled with article 5 and article 2A(2), which requires that matters not expressly settled by the Model Law are to be determined according to its general principles, the implication is that the courts should take a light touch approach to the existence and validity of an arbitration agreement. However, the Model Law allows a certain amount of discretion.

The discretion allowed under article 8 is reflected in how different courts approach their role in ensuring a just and cost-effective arbitration process. Judges that lean more towards the jurisdictional model are likely to scrutinise the arbitration agreement in more detail than those that lean towards the contractual or autonomous model. For example, the courts in Hong Kong only require the *prima facie* existence of an arbitration agreement, while the English courts look more widely at all the relevant circumstances.[289]

In the Canadian case of *Jean Estate v Wires Jolley LLP*, Juriansz JA explained that the choice between the court taking an 'interventionist' or '*prima facie*' approach was determined by different perspectives on the pragmatic role of the courts as facilitators

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[288] *Explanatory notes to the UNCITRAL Model Law* (UN 2008), [17].

[289] Compare *Nanhai West Shipping Co v Honk Kong United Dockyards Ltd* [1996] 2 HKC 639 (HC, Hong Kong) with *Ahmad Al-Naimi v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522 (CA)

of the arbitration process.[290] Characterising itself as facilitator, the interventionist approach is based on the view that an early definitive determination of the arbitration tribunal's jurisdiction will save time and money. This, however, will only be the case where the court decides that the tribunal has no jurisdiction to decide the dispute. The *prima facie* approach is based on the idea that a fast referral to arbitration is the most efficient, reducing the impact of delaying tactics. However, the different approaches may also be explained on the basis that the interventionist approach is more concerned with procedural justice, while the *prima facie* approach, reflecting the competence-competence principle,[291] is more concerned with the autonomy of the arbitration process and the bedrock principle of party autonomy.[292]

That different courts have reached disparate conclusions regarding their role under article 8 is both a strength and a weakness. The discretion permitted by the Model Law allows sensitivity to the local legal culture. This, however, undermines the aim of harmonisation and, where the courts take an interventionist approach, it undermines the autonomy of the arbitration process. How far it also interferes with the principle of party autonomy is complex and will be addressed later in this chapter.

The court's jurisdiction under article 8 is concerned with both legitimising and facilitating the arbitration process. To those ends, the court has further jurisdiction to ensure the tribunal is properly established. Under article 11, courts are authorised to appoint an arbitrator, but only where the arbitration agreement and the default mechanism under article 11(3) both fail. As with article 8, the court must determine that there is a valid arbitration agreement, which again provides scope for different

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[290] *Jean Estate v Wires Jolley LLP* [2009] ONCA 339 [95-97]; CLOUT case No 1044 (ON CA, Canada).

[291] *H & H Marine Engine Service Ltd v Volvo Penta of the Americas Inc* [2009] BCSC 1389, [38-41].

[292] See, eg: *Burlington Northern Railroad Co v Canadian National Railway Co* [1997] 1 SCR 5 (SC, Canada), relying on the public policy argument in the dissenting judgment of Cumming J in the British Columbia Court of Appeal hearing: *Burlington Northern Railroad Co v Canadian National Railway Co* (1995) 20 BLR (2d) 145 (BC CA).

degrees of scrutiny.[293] This supportive jurisdiction cannot be excluded by the parties and any decision is final.[294]

Under article 13(3), the court may be involved where a party challenges the appointment of an arbitrator. Limiting the court's jurisdiction to a supporting role, the authority only arises where a challenge is either unsuccessful under a procedure agreed by the parties or is rejected by the arbitration tribunal. To balance the court's involvement against the efficiency of an autonomous arbitration process, there is no jurisdiction for appeal from the court's ruling. Furthermore, as with article 8, the arbitration may continue while awaiting the court's determination. The point behind this is to prevent the use of article 13 as a delaying tactic.[295] In keeping with this, the court has no jurisdiction to grant an injunction to stay those proceedings.[296] A similar role for the court exists under articles 14 and 15 to remove and replace an arbitrator who 'becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay'. Unlike the court's role under article 11, the parties can agree to exclude the court's jurisdiction and determine the matter by, for example, the rules of an arbitration institution.[297]

Note that in all issues arising prior to the substantive arbitration, the jurisdiction of the court provides a failsafe where the very existence of the arbitration agreement is challenged, or the otherwise autonomous process of arbitration fails. In fulfilling this

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[293] Compare *Vale Do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 Lloyd's Rep 1, 11 with *Villeneuve v Pelletier* [2010] QCCS 320 [44-49] (QC SC, Canada).

[294] Secretary General of the UN General Assembly, *Analytical commentary on draft text of a model law on international commercial arbitration*, A/CN.9/264, (UN 1985) 28, available at: <http://www.uncitral.org/uncitral/en/commission/sessions/18th.html>, accessed 30 November 2017.

[295] *Nikiforos v Petropoulos* [2007] QCCS 3144 [31] (QC SC, Canada).

[296] *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush and another* [2004]

SGHC 26, [2004] 2 SLR(R) 14 (HC, Singapore).

[297] UNCITRAL, *Report of the UN Commission on International Trade Law (on the work of its eighteenth session)*, Official Records of the General Assembly, Fortieth Session, Supplement No 17, A/40/17, (UN 1985), 27.

role, the court's duty is first, as a matter of procedural justice, to legitimise and then, as a matter of cost-effectiveness, to facilitate the process of arbitration. Although courts have taken different approaches to the permitted level of scrutiny of jurisdictional issues, the underlying principle of party autonomy suggests that the courts should take a *prima facie* approach to the existence and validity of the agreement. This framework reflects the hybrid model of arbitration, but does so in a way that leans more towards party autonomy and the contract model.

Before considering the tribunal's jurisdiction, it should be noted that article 6 allows the state to establish an alternative forum to the court that would be competent to determine issues arising under articles 11(3),(4), 13(3), 14, 16(3) and 34(2). There is no reason why this forum could not be a national arbitration tribunal rather than a traditional court,[298] so allowing the state to reflect a more autonomous approach to arbitration. Such a tribunal would only have jurisdiction in relation to the supportive role required under articles 11, 13 and 14. Where the legitimacy of the tribunal or the award is in question, as in articles 16 and 34, the Model Law specifically restricts jurisdiction to 'the court specified in article 6'. This distinction reflects the balance between procedural justice and cost-effectiveness that was identified in the previous section.

Turning now to the Scottish Act, under s.10 of which the court is required to suspend any legal proceedings on the application of a party to a valid and effective arbitration agreement that relates to the subject matter of the dispute.[299] The emphasis is on the suspension of legal proceedings rather than referral to arbitration, as under article 8 of the Model Law. The effect, however, is equivalent and, like the Model Law, it applies regardless of the existence or location of the seat of arbitration.[300] According

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[298] Chinwe A Mordi, 'An Analysis of National Courts Involvement in International Commercial Arbitration; Can International Commercial Arbitration be Effective without National Courts?' (2016) 6 *Open Journal of Political Science* 95.

[299] Scottish Act, s 10(1).

[300] Scottish Act, s 10(3).

to the Policy Memorandum, this provision reflects '[t]he traditional approach of the Scottish courts ... that a valid and binding arbitration agreement suspends the jurisdiction of the courts and commits the party to arbitrate the dispute'.[301] The key issue then turns on whether the Scottish courts adopt a *prima facie* approach to the arbitration agreement, or are more interventionist.

Insufficient time has passed since the Act was passed for a definitive body of case law to build up, but some insights may be gained by looking to English case law. As Lord Glennie stated: 'Since the Act was closely and unashamedly modelled on the English Act, and reflects the same underlying philosophy, authorities on the that Act ... in relation to questions of interpretation and approach will obviously be of relevance'.[302]

In *Naimi v Islamic Press Agency Inc*,[303] the English Court of Appeal accepted the approach taken in *Birse Construction Ltd v St David Ltd*,[304] and held that it was not obliged to simply refer the issue of the existence and validity of the arbitration agreement to the tribunal under the competence-competence principle.[305] Rather, it should make its own enquiry and at least consider the affidavit evidence. It could, however, look more deeply at the issue, resolving questions of procedural justice and balancing the rights and interests of the parties. Cost and efficiency were important and the court should consider whether a definitive determination by the court might be the most efficient course of action by forestalling possible challenges to the arbitral award in the future. But, it also needed to consider the right not to be subject to the jurisdiction of the tribunal in the absence of a valid and effective arbitration agreement. While the level of scrutiny might vary, the court would have to be

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[301] *Arbitration (Scotland) Bill: Policy Memorandum*, 29 January 2009, [89].

[302] Arbitration Application (No.3 of 2011) [2011] CSOH 164, [8].

[303] *Naimi v Islamic Press Agency Inc* [2000] EWCA Civ 17.

[304] *Birse Construction Ltd v St David Ltd* [1999] BLR 194.

[305] English Act, s 30.

'virtually certain' that an arbitration agreement exists before issuing a stay and referring the matter to the arbitration tribunal.[306] Although there is no doubt that the court is entitled to consider the existence and validity of an arbitration agreement,[307] the approach taken by the Court of Appeal here shows a willingness to go beyond the *prima facie* approach adopted by many, but not all, Model Law jurisdictions.

As with the Model Law, the court has jurisdiction, under mandatory r.7, to assist in the creation of the tribunal where all other mechanisms fail. Where the Scottish Act is more innovative is in the creation of the role of an arbitral appointments referee.[308]Although the parties can opt-out,[309] a referee may be used to assist in creating the tribunal in preference to an application to the courts. This 'remarkable feature of the Act'[310] should streamline the process as well as provide an additional option to further support party autonomy.

Under mandatory rr.12-14, the Scottish courts have a similar supportive jurisdiction to that provided for under articles 13 and 14 of the Model Law. In other words, where a challenge to an arbitrator is rejected by the tribunal, an application may be made to the court. As under the Model Law, the arbitration process may continue while the application is considered. Where an arbitrator's tenure ends, then the court may again be involved in the appointment of a new arbitrator in accordance with r.7.

As a final point, it should be noted that the court also has the default jurisdiction, under s.3, to determine that Scotland is the seat of arbitration, with the implication

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[306] See Waller LJ's discussion in: *Naimi v Islamic Press Agency Inc* [2000] EWCA Civ 17.

[307] Fraser Davidson, Hew, R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W. Green 2010) 31.

[308] Joanna Dingwall, 'International Arbitration in Scotland: A Bold New Future' (2010) 13 *International Arbitration Law Review* 138, 142.

[309] SAR, r 7(2).

[310] Fraser Davidson, 'The Arbitration (Scotland) Act 2010: The Way Forward or a Few Missteps?' [2011] 1 *Journal of Business Law* 43, 51.

that the Scottish Act would provide the *lex arbitri*.[311] This jurisdiction only comes into effect where other mechanisms to determine the seat fail. As such, it supplements rather than restricts party autonomy and the jurisdiction of the arbitration tribunal. The aim behind the provision is to increase certainty and 'avoid disputes' over the applicable *lex arbitri*, which should facilitate the process of arbitration.[312] This may, however, allow a party to apply to the Scottish court to counter a foreign court's ruling that Scotland is not the seat.[313]

Like both the Model Law and the Scottish Act, the SAL 2012 requires the court to dismiss any case before the court where the dispute is the 'subject of an arbitration agreement'.[314] This means that, before referring a case for arbitration, the court must satisfy itself that the dispute falls within the scope of the arbitration agreement. As illustration, consider Case no.361199450, in which the Mecca Court of Appeal was asked to decide whether a dispute should proceed to arbitration. The case involved a dispute in which the plaintiffs had defaulted on a bank loan and agreed to give the bank a 60% share in their business. They claimed that this did not reflect the true value of the business and argued that the defendant bank owed them 320 million Saudi riyals. The defendant bank raised the point that item 15 of the company's articles of association required disputes to be settled amicably or by arbitration. The court examined item 15 and held that it did not apply to the current dispute, which was concerned with the value of the ownership share, rather than 'the execution of the agreement or its interpretation'.[315]

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[311] Fraser Davidson, Hew, R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W. Green 2010) 16-17.

[312] *Arbitration (Scotland) Bill: Policy Memorandum*, 29 January 2009, [67].

[313] See the discussion in: Fraser Davidson, Hew, R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W. Green 2010) 18-19.

[314] SAL2012, article 11.

[315] Case no 361199450 (2015 (1436H)).

The arbitration process should not be interrupted while the court determines the application under article 11(1) of the SAL 2012.[316] Similarly, the court must refer a case to arbitration where the parties form a valid agreement during a court hearing.[317] These provisions help to establish the primacy of arbitration, where an agreement exists. However, article 11 fails to provide guidance regarding the extent of any enquiry that the court must make into the existence and validity of the putative arbitration agreement. Clearly there must be sufficient evidence that such an agreement exists, but there is no explicit requirement for the agreement to be valid or effective. This differs from the wording of Article 12, which requires that the agreement must satisfy the conditions set down in Article 9. As it stands, the courts appear to have a wider discretion over pre-existing agreements than where the agreement is contemporaneous to the court hearing. The approach may arguably be justified as an attempt to reduce the risk of uncertainty (gharar), which may be greater with pre-existing than contemporaneous agreements. Indeed, arbitration clauses are acceptable under Sharia precisely because they reduce the uncertainty of how any future disputes should be resolved.[318] However, it is equally important to ensure that the legal rules governing the courts' role are clear and consistent. For that reason, especially given that Saudi courts are not bound by precedent, it would have been better had the two articles been similarly drafted, with greater guidance for the courts regarding the level of enquiry required.

Given the previous the previous history of arbitration in Saudi Arabia (see 1.3.3), and the criticism that the national courts were too ready to intervene, it is important that the legal rules provided for by the legislation are sufficiently clear, precise and consistent regarding the limits of the court's role. By clearly and consistently delimiting the scope for a court to intervene, the legal rules could help to encourage a more pro-arbitration culture and avoid sending mixed messages about the role of

[316] SAL 2012, article 11(2)

[317] SAL 2012, article 12.

[318] Mutasim Ahmad Alqudah, 'The Impact of Sharia on the Acceptance of International Commercial Arbitration in The Countries of the Gulf Cooperation Council' (2017) 20 *Journal of Legal, Ethical and Regulatory Issues* 1, 7.

the courts. However, the discretion currently left to the courts, unless combined with a pro-arbitration culture, could result in arbitration agreements being scrutinised to an extent that goes beyond the widely-accepted *prima facie* approach. This may be particularly so where the case involves an agreement for arbitration in a foreign seat. Zegers notes that there have been cases in the past where clauses agreeing to foreign arbitration have been disregarded by the Board of Grievances. He concludes: 'This is evidence of a generalized lack of awareness of established international practice on the part of Saudi judges. It also highlights a degree of inertia within the judicial establishment to effect meaningful change'.[319] Saudi Arabia has recently invested substantial sums in reorganising the courts and educating judges, but the impact of these changes remains to be seen.[320] The same can be said of the SAL 2012 itself. However, while articles 11 and 12 are broadly to be welcomed, absent a significant change of culture, the courts still retain more discretion to intervene than might be desirable for Saudi to be seen as arbitration friendly.

Following the Model Law, the SAL 2012 allows the court jurisdiction to support the process of arbitration by assisting in the initial appointment of an arbitrator as a failsafe where the default mechanisms fail.[321] As with other aspects of its supportive role, the court must be satisfied that the parties are bound by a valid arbitration agreement. For example, in a case where the defendant had assigned his legal obligations to a new company, the Riyadh Court of Appeal refused to oblige the defendant to appoint an arbitrator since the assignment had effectively transferred legal capacity to enter arbitration proceedings with the plaintiff company. The

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[319] Jean-Benoit Zegers, 'National Report for Saudi Arabia', in: Jan Paulsson (ed) (Kluwer Law International 1984, Supplement No 75 2013) *International Handbook on Commercial Arbitration* 1, 20-21.

[320] Jean-Benoit Zegers, 'National Report for Saudi Arabia', in: Jan Paulsson (ed) (Kluwer Law International 1984, Supplement No 75 2013) *International Handbook on Commercial Arbitration* 1, 2-3; Ahmed A Altawyan, 'The Legal System of the Saudi Judiciary and the Possible Effects on Reinforcement and Enforcement of Commercial Arbitration' (2017) 10 *Canadian International Journal of Social Science and Education* 269, 272.

[321] SAL 2012, article 15.

plaintiff company should give notice of their intention to arbitrate the dispute with the new company, rather than the defendant.[322]

This jurisdiction has a thirty-day time limit and the court's decision is not open to challenge. Both conditions should help to ensure an efficient arbitration process. Also, following the Model Law, the courts have jurisdiction to dismiss an arbitrator, but only where a prior application to the tribunal has been unsuccessful.[323] Similarly the court has jurisdiction to assist in the removal of a non-performing arbitrator where the two parties fail to agree.[324] There is no appeal from the court's decision under either of these articles.

As with the Model Law and the Scottish Act, the SAL 2012 here allows the court to play a supportive role that should facilitate the process of arbitration. However, as discussed previously, the Scottish Act provides for an arbitration appointment referee, which should reduce the role of the court even further and help to streamline the process. It is a development that might also be beneficial to Saudi, even beyond the direct effect on the arbitration process itself. It would help to develop both an internal pro-arbitration culture as well as improve the perceptions of the international business community regarding Saudi as an arbitration friendly state. This will be discussed further in chapter six.

2.3.3 The arbitration tribunal's jurisdiction

Ab initio, and within the terms of the national law, the tribunal is granted jurisdiction by the arbitration agreement made by the parties to the disputed contract.[325] This is

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[322] Case no 3783719 (2015 (1436H)).

[323] SAL 2012, article 17.

[324] SAL 2012, article 18.

[325] Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (Student Version) (5th ed OUP 2009) 341.

central to the respect for party autonomy required by the nature of arbitration and is unproblematic unless that jurisdiction is challenged. Under the ideal autonomous model, resolution of the challenge would fall to the tribunal itself, with any appeal or review conducted by an independent, perhaps international, arbitration tribunal. Under the more pragmatic hybrid model, the primary determination should again lie with the tribunal, in much the same way that the courts have the jurisdiction, subject to appeal, to determine their own jurisdiction. However, given that the legitimacy of the arbitration process ultimately derives from the national law, any appeal or review would be performed by the courts.[326] Such an approach respects the autonomous choice of the parties to elect for arbitration, while ensuring that the process is procedurally just.

Consistent with this, article 16(1) of the Model Law provides that: 'The arbitration tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement'. The use of "including" means that the tribunal's authority to rule on its own jurisdiction extends beyond the existence and validity of the arbitration agreement to include issues such as the scope and enforceability of the arbitration agreement.[327] Article 16 implements the competence-competence principle, but, because of article 1(2), only applies where the seat of arbitration has been established within that jurisdiction. The courts' responses to this have been mixed, with some holding that a *prima facie* approach to jurisdictional questions will only apply where the court can be sure that the seat is, or will be, in a state where the principle of competence-competence applies.[328]

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[326] *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2010] 3 WLR 1472 [84], per Lord Collins.

[327] *M/S Anuptech Equipments Private v M/S Ganpati Co-Op Housing* (1999) BomCR 331 (Bombay HC, India); Chartered Institute of Arbitrators, *International Arbitration Practice Guidelines: Jurisdictional Challenges* (2016), 2 < http://www.ciarb.org/guidelines-and-ethics/guidelines/arbitration-guidelines> accessed 30 November 2017.

[328] *H & H Marine Engine Service Ltd v Volvo Penta of the Americas Inc* [2009] BCSC 1389 (Canada).

Article 16(1) also incorporates the doctrine of separability, which requires the arbitration clause of any contract to be considered an independent contract. This allows the tribunal to rule that the main contract is 'null and void', while leaving the arbitration agreement - and hence its own jurisdiction - intact. As with the initial question of jurisdiction, the doctrine of separability could, in theory, be affected by article 1(2) where the seat has either not been established, or has been established in a foreign jurisdiction.[329] However, the courts have generally applied the doctrine regardless of the location of the seat.[330]

The wording of article 16 is important because it makes clear that separability can only apply where there is an existent contract. This may be compared with the explicitly wider wording of s.7 of the English Act, which provides that an arbitration clause may still be valid even where the main contract 'did not come into existence'. The problem is that if a contract does not exist it would seem to follow that the arbitration clause must also not exist. However, despite the apparent inconsistency in the wording of the English Act, Lord Hoffmann argued *obiter*, in the *Fiona Trust* case, that an arbitration clause might have been agreed even though the main contract had not been concluded.[331] In other words, the arbitration clause is almost completely independent of the main contract. Thus, an arbitration agreement may survive an improperly entered-into main contract, where, for example, an agent has been bribed to exceed his authority. It is only where 'the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid' that an arbitration agreement will fail along with the contract.[332] The doctrine reflects a clear intention to respect party autonomy and give effect, as far as possible, to the

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[329] *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 [218ff] (FC, Australia).

[330] *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 [218ff] (FC, Australia); *Krutov v Vancouver Hockey Club Limited* [1991] CanLII 2077 (BC SC, Canada),

[331] *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40 [18].

[332] *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40 [17].

parties' original intention to arbitrate a dispute. This will only fail where the arbitration agreement itself is null and void.[333]

Under article 16(2), the tribunal's jurisdiction may only be challenged before 'submission of the statement of defence'. After this, a party may only challenge the scope of the tribunal's jurisdiction, which must be done 'as soon as the matter' arises. Article 16(3) allows the tribunal to determine jurisdictional issues either as a preliminary issue or as part of the decision on the merits. Considering cost-effectiveness, where jurisdiction is determined as a preliminary matter, regardless of the form of the decision,[334] the parties have a right to refer to 'the court specified in article 6' without delay. The subsequent decision of that court is final. Again, there is a lack of consistency on the depth of inquiry the court may make when reviewing a preliminary jurisdictional decision. Some courts have performed a full review of the decision.[335] Others have taken a more deferential approach, beginning with the 'powerful presumption' that the tribunal acted within its authority.[336] While the issue is being determined, the arbitration proceedings may continue.

The Model Law itself is silent on the issue of whether article 16(3) is mandatory. However, the Quebec Court of Appeal has held that where the parties agreed for an arbitration to proceed under rules that did not provide for the right to apply for a court ruling on a preliminary jurisdictional decision, then such an agreement acted as an effective waiver of any right under article 16(3).[337] Following this ruling, a valid

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[333] *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40 [32-35], per Lord Hope.

[334] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41; [2007] 1 SLR(R) 597 (CA, Singapore).

[335] See, eg: *Canadian Ground Water Association v Canadian Geoexchange Coalition* [2010] QCCS 2597 (QC SC, Canada).

[336] *Ace Bermuda Insurance Ltd v Allianz Insurance Company of Canada* [2005] ABQB 975 (Alberta QB, Canada).

[337] *Compagnie Nationale Air France v Mbaye* [2003] CanLII 35834 (QC CA, Canada).

waiver would effectively relieve the court of any jurisdiction to review a preliminary decision.

There is a clear sense in this article, that the Model Law is attempting to balance autonomy and efficiency with the procedural justice provided by the regulatory oversight of the courts. In his review of the draft Model Law, Kerr criticised the draft article 16 for not allowing recourse to the courts until after the award had been made. While supporting the competence-competence principle, he opined that leaving the parties 'locked into' the process until after the award, while the arbitrator is free to 'act in uncontrollable excess of his jurisdiction', may result in an unnecessary and unacceptable 'waste of time and costs'.[338] The current version of Article 16 goes someway to addressing this criticism, but only where the jurisdictional issue is determined as a preliminary issue. In this regard, it seems a reasonable compromise that allows the parties to challenge the tribunal's determination of jurisdiction, but not to use that challenge as a tactical response when the case is going badly.

Turning now to consider Scots Law. Under mandatory r.19, the arbitration tribunal is given the authority to determine its own jurisdiction, consistent with the competence-competence principle and article 16 of the Model Law. Specifically, it can determine the validity and scope of the arbitration agreement,[339] as well as 'whether the tribunal is properly constituted'.[340] It is not entirely clear whether this is an exhaustive list of issues over which the tribunal has jurisdiction, but Davidson et al. suggest that the equivalent s.30 of the English Act may have a wider application and include other jurisdictional issues.[341] This conclusion was based on Seymour J's *obiter* in *Mackley & Co Ltd v Gosport Marina Ltd*, that: 'it may be arguable whether the jurisdiction of

338 Lord Justice Kerr, 'Arbitration and the Courts - the UNCITRAL Model Law' (1984) 50 *Arbitration* 3, 15.

339 SAR, r 19(a) and (c).

340 SAR, r 19(b).

341 Fraser Davidson, Hew, R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W. Green 2010) 146.

an arbitrator to decide on his substantive jurisdiction extends to any matter not specifically set out … s.30(1), because of the qualification "that is to say"'.[342] Those words are not found in r.19 of the SAR, but the phrase 'the tribunal may rule on' is equally open to the interpretation that the list not exhaustive.

It is submitted that there is nothing particularly controversial about including the competence-competence principle, which is widely accepted as a key component of an effective arbitration process. Similarly, the doctrine of separability, provided for by s.5 of the Act, is equally widely accepted. As with the approach under Model Law, s.5 and r.19 differ from the equivalent s.7 and s.30 of the English Act by precluding the parties from opting-out of the doctrine, which is an unnecessary restriction on party autonomy.[343] It should be noted, however that the Scottish Act provides for separability and competence-competence in distinct provisions, while the Model Law includes both within the single article.

In separating competence-competence from the doctrine of separability, the Scottish Act follows the English approach. However, while the English Act includes both within the main body of the statute, the principle of competence-competence is provided for by a rule, albeit a mandatory one, under Schedule 1 of the Scottish Act. The Policy Memorandum is silent on this, but Davidson et al. suggest it usefully clarifies that, while related, competence-competence and separability are distinct principles.[344] Perhaps more important than their simple separation, is the inclusion of the competence-competence principle within the arbitration rules. This could be seen, at least symbolically, as reinforcing the association between the principle and the arbitration process. This, in turn, emphases the philosophy that the courts should take

[342] *Mackley & Co Ltd v Gosport Marina Ltd* [2002] BLR 367, [27].

[343] Fraser Davidson, Hew, R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W. Green 2010) 22, 145.

[344] Fraser Davidson, Hew, R. Dundas, David Bartos, *Arbitration (Scotland) Act 2010* (W. Green 2010) 145.

a light touch approach and allow the arbitration tribunal to determine its own jurisdiction rather than engage too deeply with the issues at a preliminary stage.

This effect may be amplified by explicitly providing, under s.5 of the Scottish Act, that the arbitration tribunal has jurisdiction to determine the validity of a clause containing the arbitration agreement. However, whether the structural approach of the Scottish Act is of any practical significance remains to be seen. Much depends on whether the Scottish courts follow the English line of cases that support an interventionist approach or if they swayed by the more arbitration friendly approach taken in *Fiona Trust v Privalov*, in which Lord Hoffmann emphasised that s.7 was intended to 'give effect to the reasonable commercial expectations of the parties about the questions which they intended to be decided by arbitration'.[345]

Under mandatory r.20, the parties may make an objection to the tribunal regarding its jurisdiction. As with the Model Law, the tribunal may determine the issue as a preliminary matter or leave it to be decided along with the merits. Here the Scottish Act goes further than the Model Law and the tribunal's discretion to decide the matter as a preliminary issue or along with the merits is subject to any agreement between the parties.[346] This is another example of where the Scottish approach improves on the Model Law by enhancing party autonomy. Furthermore, the Scottish Act imposes the shorter time limit of fourteen days for an appeal against the tribunal's decision,[347] which should improve the efficiency of the arbitration process.

A key distinction between the Scottish Act and the Model Law is provided for by default r.22, which provides: 'The Outer House may, on an application by any party, determine any question as to the tribunal's jurisdiction'. According to the Policy

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[345] *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40 [12].

[346] SAR, r 20(4).

[347] SAR, r 21.

Memorandum, this facility, which broadly follows s.32 of the English Act, was included in response to suggestions made by consultees and allows the court to decide on difficult jurisdictional issues that would otherwise almost certainly be challenged.[348] Again, the aim is to facilitate a speedy resolution of the arbitration proceedings, which are permitted to continue while the jurisdictional issue is determined. Reflecting the aim of avoiding unnecessary delays, there is no appeal, either on the validity of the application or on the court's ruling. An application can be made only where both parties agree or where the tribunal consents and the court is satisfied that the application is timely, will 'produce substantial savings in expense' and that there is 'a good reason why the question should be determined by the court'.[349] These provisions are intended to limit the possibility that a party will use this as a delaying tactic. It remains to be seen how effective this will prove, but they serve the appropriate end of balancing cost-effectiveness and respect for party autonomy.

The court is afforded an identical jurisdiction to intervene and determine any point of Scots Law.[350] This follows the English Act[351] and is a welcome variation to the Model Law that serves to further party autonomy and procedural justice, facilitating the arbitration process while limiting the opportunity for abuse of the process. This should save both time and money.[352] It may, however, be considered contrary to the 'intention to reduce court intervention to a minimum'.[353]

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[348] *Arbitration (Scotland) Bill: Policy Memorandum*, 29 January 2009 [139].

[349] SAR, r 23.

[350] SAR, r 41, 42

[351] English Act, s 45.

[352] Fraser Davidson, 'The Arbitration (Scotland) Act 2010: The Way Forward or a Few Missteps?' (2011) 1 *Journal of Business Law* 43, 50.

[353] Hong-Lin Yu, *Commercial Arbitration: The Scottish and International Perspectives* (Dundee University Press 2011) 239.

A further authority granted to the court under the Scottish Act is the jurisdiction to vary any time limits set by the party.[354] This is a default authority, which means that the court's jurisdiction can be excluded by the parties' agreement.[355] It is further tightly circumscribed under r.44, which precludes the jurisdiction in the face of an existing arbitral process to achieve the same end, and imposes the condition that the power must only be exercised to avoid a 'substantial injustice'. Again, this allows the courts a greater role than under the Model Law, but makes the court's involvement conditional on the pursuit of justice and the will of the parties.

The aim behind these rules is to facilitate the arbitration process in an efficient, cost-effective manner that is both just and sensitive to party autonomy. They do so by allowing the courts an authority that is derivative either on party autonomy or the authority of the tribunal. By allowing the parties to control the court's role, Scots law is transformed from a static set of rules into a flexible instrument, responsive to the needs of the arbitration process and the will of the parties. How far the law fulfils its promise will depend on how it works in practice, which can only be assessed when a more substantial body of Scottish case law has built up.

Turning now to the approach under the SAL 2012. As a major development for arbitration in Saudi,[356] the SAL 2012 follows the Model Law by including both the principle of competence-competence and the doctrine of separability. Like the Scottish Act, the SAL provides for these in two separate articles.[357] Article 20 allows the tribunal the jurisdiction to determine its own jurisdiction, and provides it with the discretion to allow time barred pleas 'if it considers the delay to be justified'. As with

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[354] SAR, r 43, 44.

[355] Fraser Davidson, 'The Arbitration (Scotland) Act 2010: The Way Forward or a Few Missteps?' (2011) 1 *Journal of Business Law* 43, 50.

[356] Ahmed A Altawyan, 'The Legal System of the Saudi Judiciary and the Possible Effects on Reinforcement and Enforcement of Commercial Arbitration' (2017) 10 *Canadian International Journal of Social Science and Education* 269.

[357] SAL 2012, articles 20, 21.

the Model Law, the decision may be made as a preliminary issue or delayed and determined along with the merits.

Where the tribunal dismisses a plea, any challenge to its jurisdiction must wait until after the arbitration award has been made and raised as a motion to set aside the award.[358] This appears to preclude an appeal to the court until the conclusion of the arbitral proceedings, even where the jurisdictional challenge is determined as a preliminary matter. This restricts the role of the court and reduces the opportunity for delaying tactics. However, it will only prove to be cost-effective in those cases where the award is not subsequently challenged. Since a challenge during the arbitration hearing could be heard by the court while the arbitration proceedings continue, as under the Model Law, there is likely to be a greater delay to enforcement where any challenge must wait until after the award has been made. It might have been better had the SAL 2012 followed the Model Law and the Scottish Act and allowed an earlier appeal to the court. Following the Quebec Court of Appeal's interpretation of the Model Law,[359] the parties should be allowed to waive this right, respecting party autonomy by giving them control over the choice.

Even greater respect for party autonomy might have been provided had the SAL 2012 followed the English Act and allowed the parties to opt-out of the principle of competence-competence. However, since allowing the tribunal the authority to rule on its own jurisdiction is a significant development for Saudi arbitration, making the principle mandatory may play a crucial role in fostering a pro-arbitration culture and encouraging the courts to take a more supportive and less interventionist approach. The same concern does not apply to following the Scottish Act and giving the parties control over whether the jurisdictional issue is determined as a preliminary matter or along with the merits.

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[358] SAL 2012, article 20(3).

[359] *Compagnie Nationale Air France v Mbaye* [2003] CanLII 35834 (QC CA).

Under article 21, the 'arbitration clause contained in a contract is deemed independent from the other terms of the contract' and its validity is to be determined separately. Again, this is an important new development for Saudi arbitration. Providing for the doctrine of separability in an independent provision follows the approach taken in the Scottish Act and has the benefit of clearly distinguishing it from the principle of competence-competence. This clarity is important in a jurisdiction with a tradition of heavy court supervision and intervention as it emphasises that the doctrine of separability applies regardless of whether the arbitration clause is scrutinised by the court or by the arbitration tribunal.

Al-Hoshan argues that article 21 is: 'an odd provision given .... that when a contract is declared void under the Shari'a Law, such nullity affects all the clauses contained in said contract. Several authors specialized in Shari'a Law have confirmed the same'.[360] This criticism is perhaps misguided, as explained in the dissenting judgment of Al-Khasawneh in *Pakistan v India*:

> under Islamic law, the problem of separability would seem to be governed by the maxim "*Ma La Udraku kulluh La Utraku Julloh*"- that which cannot be attained in its entirety should not be substantially abandoned. A concept remarkably similar to the Roman Law principle *ut res magis valeat quam pereat* - a document should be given validity wherever possible.[361]

Although the context is different, the implication is that *Sharia* need not be a barrier to separability, particularly given that 'the doctrine of severance exists under rules of *Sharia'*.[362] Furthermore, the separability of the arbitration clause has recently been enforced by a Saudi court, which held that the arbitration clause was not subject to a

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[360] Mohammed Al-Hoshan, 'The New Saudi Law in Arbitration: Presentation and Commentary' (2012) 4 *International Journal of Arab Arbitration* 5, 9.

[361] *Pakistan v India* (2000) 54 ICJ Reports, [33].

[362] Mutasim Ahmad Alqudah, 'The Impact of Sharia on the Acceptance of International Commercial Arbitration in The Countries of the Gulf Cooperation Council' (2017) 20 *Journal of Legal, Ethical and Regulatory Issues* 1, 8.

choice of law clause in the main contract.[363] The possibility, however, that there may be different interpretations of *Sharia* law and separability makes it even more important that the SAL 2012 clearly separates the doctrine from the principle of competence-competence, entailing that it applies equally to the court as to the arbitration tribunal.

Following the approach under both the Model Law and the Scottish Act, the parties are not free to opt-out of the separability provision. Allowing the parties to opt-out would have provided a greater respect for party autonomy. However, given that incorporating the doctrine is a significant advance for Saudi arbitration, it is better to leave it as a mandatory provision until a more pro-arbitration culture is firmly established. The mandatory provision of the principle of competence-competence and the doctrine of separability sends a strong message regarding the relationship between the courts and the arbitration process and it is better to allow this message to bed-in before allowing the parties more autonomy to vary these core components of the new regulation.

As might be expected, the SAL 2012 follows the Model Law, rather than the Scottish Act, precluding the parties from applying to the court for a decision on questions regarding the tribunal's jurisdiction or to determine a point of national law. Again, given the need to develop a more pro-arbitration culture, this circumspect approach may be justified. However, the approach under the Scottish Act allows the parties more autonomy to control the arbitration process. As discussed earlier, the Scottish Act includes, under r.23, conditions intended to ensure that that the power to apply to the court will only be available where it will serve to increase justice and cost-effectiveness. A similar approach could work in Saudi, if supported by suitable guidance, explanation and education.

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[363] Case no 32328746, Riyadh General Court, February 2012 as cited in: Majed Alrasheed, Judge Mostafa Abdel-Ghaffar, 'Saudi Strides' (11 April 2017) *Global Arbitration Review* <www.globalarbitrationreview.com> accessed 20 August 2018.

2.3.4 The arbitration award and the court's jurisdiction[364]

The Model Law provides that once the award has been made, the tribunal's jurisdiction ends.[365] The court is then granted jurisdiction to set aside an award provided the application is made within three months and one of the conditions under article 34(2) is satisfied. Article 34(2)(a) sets out a number of grounds reflecting flaws in the arbitration process, while article 34(2)(b) allows the court to set aside the award on grounds of arbitrability or public policy. The role of the court and the acceptable level of intervention was considered by the Court of Appeal of British Columbia. Gibbs JA explained:[366]

> The reasons ... for restraint in the exercise of judicial review are highly persuasive. The "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" spoken of by Blackmun J. are ... compelling ... It is meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention ...

The court's jurisdiction is limited to the specified grounds and precludes a review of the merits.[367] This, however, does not prevent an appeal to 'an arbitral tribunal of second instance if the parties have agreed on such a possibility'.[368] There may also be a limited scope for the parties to exercise their autonomy by excluding or limiting the right for review by the court. Any such exclusions would be subject to public policy

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[364] See also the discussion in chapter five.

[365] Model Law, Article 32.

[366] *Quintette Coal Ltd v Nippon Steel Corp* [1991] 1 WWR 219; [1990] BCJ No 2241, [32] (BC Court of Appeal, Canada).

[367] *Government of the Republic of the Philippines v Philippine International Air Terminals Co Inc* [2007] 1 SLR (R) 278; [2006] SGHC 206 (HC, Singapore).

[368] *Explanatory notes to the UNCITRAL Model Law* (UN 2008), [45].

and the mandatory provisions of the implementing national law.[369] There is, however, no equivalent scope for the parties to exercise their autonomy by extending the scope of review by the court.[370]

The final jurisdictional issue is that, under article 35, the court is required to recognise and enforce an arbitral award 'irrespective of the country in which it was made'. This empowers a court regardless of whether it would have jurisdiction to resolve a contractual dispute between the parties.[371] However, irrespective of the mandatory wording of Article 35(1),[372] pragmatic concerns, such as where enforcement is impossible because the defendant has no assets within the relevant state, may result in a court declining jurisdiction.[373]

Article 36 sets out the exhaustive grounds on which the national court has jurisdiction to refuse recognition or enforcement.[374] These grounds, taken from article V of the NY Convention,[375] are the same as those for setting aside an award, i.e., where the process was flawed, where the subject matter of the dispute was not arbitrable or on grounds of public policy. Importantly, however, only the courts of the state in which an award was made have the jurisdiction to set aside an award,[376] while any court has

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[369] *Noble China Inc v Lei Kat Cheong* (1998) 42 OR (3d) 69 (ON SC, Canada).

[370] *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454, [105] (CA, New Zealand).

[371] *Food Services of America Inc (cob Amerifresh) v Pan Pacific Specialties Ltd* (1997) 32 BCLR (3d) 225 (BC SC, Canada).

[372] *Robert E Schreter v Gasmac Inc* 7 OR (3d) 608 (ON, Canada).

[373] Kammergericht Berlin, Germany, 20 Sch 07/04, 10 August 2006 <http://www.disarb.org/en/47/datenbanken/rspr/kg-berlin-az-20-sch-07-04-datum-2006-08-10-id596> accessed 30 November 2017.

[374] Where implementing legislation omits the restrictive 'only' from the provision then other grounds may be open to the court: *Resort Condominium v Bolwell*, 29 October 1993, (1995) Yearbook Commercial Arbitration XX 628 (QLD SC, Australia).

[375] *Explanatory notes to the UNCITRAL Model Law* (UN 2008), [54].

[376] *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393 (CA, Singapore).

the authority, under the Model Law, to recognise and enforce, or refuse to enforce, an award. This may result in different public policy concerns being applied.

Since this jurisdiction arises at the end of the arbitration process, issues of procedural justice take priority over cost-effectiveness, which is nevertheless reflected in the limited grounds available for challenging the award and its enforcement. The courts' powers under articles 34-36 support the arbitration process by ensuring that legitimate awards are appropriately recognised and, where feasible, enforced. Through this enforcement, the courts support the effectiveness of the arbitration process. It also respects party autonomy, which is expressed in the parties' agreement to arbitrate the dispute. Finally, restricting the court's role to reviewing issues of procedural justice, rather than the substantive justice of the merits, reflects the Model Law's attempt to preserve as much autonomy for arbitration as possible within the pragmatic reality of the hybrid model.

Turning now to consider the approach under Scots law. Under mandatory r.67, the courts have jurisdiction to hear an appeal against the award on the grounds that that the tribunal lacked substantive jurisdiction. The appeal is made to the Outer House of the Court of Session, which may confirm, vary or set aside the award. A further appeal may be available to the Inner House only where there is an 'important point of principle or practice' or some other 'compelling reason'.[377] Other than a challenge on jurisdiction, the SAR also permit a challenge for serious irregularity, under mandatory r.68, or legal error under the default r.69.[378]

Of these grounds for challenge, the most controversial is legal error, which is not part of the Model Law and may be criticised as 'directly contrary to ... [its] philosophy'.[379]

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[377] SAR, r 67(5).

[378] See also, the discussion of legal error in sections 5.4 and 5.6.3.

[379] Fraser Davidson, 'The Arbitration (Scotland) Act 2010: The Way Forward or a Few Missteps?' (2011) 1 *Journal of Business Law* 43, 44.

It should, however, be noted that the parties can agree to waive any right to appeal on this basis, which appropriately respects party autonomy by allowing them to decide on the inclusion of this safeguard against the possibility of an unjust award. In so doing, it 'strikes the appropriate balance' between the efficient autonomy of the arbitration process and the legitimacy provided by allowing a degree of judicial intervention in the interests of justice.[380] Although generally respecting party autonomy, the flexibility promised by r.69 is partially undermined by r.70, which sets out the procedure for making an appeal under r.69 and allows the courts to robustly reject an appellant's 'attempts to dress up its attack on the arbitrator's findings in the cloak of a legal error appeal'.[381]

Under r.70(3), before granting leave to appeal, the court must be satisfied that the tribunal's decision on the point of law was obviously wrong, or was seriously open to doubt and a point of general importance.[382] While this can be avoided if the parties agree to appeal, where an appeal is sought by only one party, this provision cuts into the parties' original agreement that an appeal under r.69 should be available. Davidson suggests that the English Act took this approach to avoid 'deterring international parties from arbitrating in England for fear that the courts would be too willing to scrutinise the substance of the award'. This policy concern, he suggests, is not so obviously relevant to Scotland.[383] As such, there seems to be little justification for imposing this barrier. If the issue is sufficiently important to the party making the appeal, then it should not need to be a point of general importance.[384]

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[380] Fraser Davidson, 'The Arbitration (Scotland) Act 2010: The Way Forward or a Few Missteps?' (2011) 1 *Journal of Business Law* 43, 52.

[381] Hew R Dundas, 'Challenge to arbitral award and survey of Scottish arbitral jurisprudence' (2017) 83 *Arbitration* 368, 371.

[382] *Arbitration Application (No 2 of 2016)* [2017] CSOH 23, [16].

[383] Fraser Davidson, 'The Arbitration (Scotland) Act 2010: The Way Forward or a Few Missteps?' (2011) 1 *Journal of Business Law* 43, 53.

[384] Fraser Davidson, 'The Arbitration (Scotland) Act 2010: The Way Forward or a Few Missteps?' (2011) 1 *Journal of Business Law* 43,53.

In *Arbitration Application (No 3 of 2011)*,[385] Lord Glennie was asked to grant leave to appeal on the grounds of legal error. In considering the statutory provisions he quoted Rix LJ, who stated that the effectively identical s.69 of the English Act: 'enacts a concern, in the interests of party autonomy, privacy and finality, that such awards should not be readily transferred to the courts for appellate review'.[386] His comment perhaps oversimplifies the impact on party autonomy. Restricting court access is more respectful of the parties' original agreement to arbitrate the dispute. However, where the parties have chosen not to exclude the court's jurisdiction with regard to legal error appeals, requiring that the point must be of general public importance can only be seen as a condition that infringes autonomy. Given that the court is only required to give leave where one of the parties has refused to agree to the appeal, such an approach seems to favour the autonomy of the party withholding its consent at the expense of the party seeking leave to appeal. It is unlikely that either party would agree to an approach that does this when making the initial agreement not to opt-out of allowing an appeal on legal error. As such, the law should give equal effect to the autonomy of each individual party. An approach that favours one party, even where it acts to restrict court intervention in the process of arbitration, fails to give due respect to the original agreement as an incident of party autonomy.

Under s.12 of the Scottish Act, the courts have the jurisdiction to enforce an award regardless of the seat, but enforcement may be refused under s.12(3), in whole or part, where the court is satisfied that the tribunal lacked the requisite jurisdiction. The courts' jurisdiction regarding NY Convention awards where the arbitration seat lies outside the UK, is set out in ss.18-22. Fulfilling Scotland's obligations as a party to the NY Convention, the grounds for refusing to recognise or enforce an award reflect those found in the NY Convention and article 36 of the Model Law. It should be noted that, under the terms of these provisions, and given the pro-arbitration bias of the NY Convention, the courts retain a discretion to enforce an award even where one of the grounds has been made out. This discretion should be exercised to achieve a 'just

[385] *Arbitration Application (No 3 of 2011)* [2011] CSOH 164.

[386] *CGU International Insurance PLC v AstraZeneca Insurance Co Ltd* [2006] EWCA Civ 1340, [3].

result in all the circumstances',[387] but following the English courts, it is likely to be rarely, if ever, used.[388]

Turning now to consider the approach under the SAL 2012, which precludes any appeal on the merits,[389] only allowing an award to be set aside on specified grounds.[390] This is consistent with the general approach to arbitration, and with both the Model Law and the Scottish Act. It is, however, a significant change for the law in Saudi, and one that certainly makes the country more arbitration friendly.[391] The specific grounds are provided for by Article 50, which essentially follows the Model Law, restricting the grounds to issues of procedure or public policy. Here the SAL 2012 makes it explicit that a contravention of *Sharia* law is also a ground for setting aside the award.

Given the fundamental importance of *Sharia* law in Saudi, this is hardly surprising. Such a condition is unlikely to be open for debate or reform and it remains to be seen how big an impact it will have on the perception of the ICA community. It is possible that, despite the many changes made by the SAL 2012 taking the country towards a more pro-arbitration position, the clause may have a chilling effect. In this regard, future empirical research may be necessary to review the impact of the changes considered alongside the condition that any awards must be consistent with *Sharia*, but such research is beyond the scope of this thesis.

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[387] *China Nanhai Oil Joint Service Corp v Gee Tai Holdings Ltd* [1994] 3 HKC 375, 386, per Kaplan J (Hong Kong).

[388] *Kanoria v Guinness* [2006] 1 Lloyd's Rep 701; [2006] EWCA Civ 222, [30] per May LJ.

[389] Ahmed A Altawyan, 'Arbitral Awards Under the New Saudi Laws and International Rules, Challenges and Possible Modernization' in Ramandeep Kaur Chhina (ed) *4th Academic International Conference on Interdisciplinary Legal Studies: 2016 (Boston) Conference Proceedings* (FLE Learning Ltd 2016) 25.

[390] SAL 2012, articles 49, 50.

[391] Jean-Pierre Harb, Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 *Journal of International Arbitration Law* 113, 125.

Unlike the Scottish Act, but following the Model Law, there is no appeal on the ground of legal error.[392] Again this could be considered a necessarily conservative approach that will help to create the perception of an arbitration friendly country, but it does so at the expense of party autonomy. The court already has a supervisory role in ensuring an award is procedurally legitimate and consistent with public policy and *Sharia*. Given this existing role, allowing an appeal on legal error, and making it subject to the parties' agreement, would not further erode the independence of arbitration. It would, however, enhance both justice and party autonomy, and the arbitration process may be protected by educating judges in the principles and practice of ICA, or establishing a specialised committee for managing these cases.[393]

Where the competent court affirms the award,[394] then there is no further appeal and the court is required to enforce the award. Where the court sets aside the award then a further appeal may be made, to the Supreme Court,[395] within a thirty-day time limit.[396] This reflects a pro-arbitration bias that again may help to alter both the legal culture within Saudi, and the perception of the ICA community. Fitting with the jurisdictional and hybrid models of arbitration, the arbitration award has *res judicata* authority,[397] and shall be enforced by the court.[398] Under article 55, the competent court is provided with limited grounds determining its jurisdiction to refuse enforcement. This article must be interpreted in the light of article 2, which requires the courts to make decisions under the SAL 2012 that are consistent with Saudi's

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[392] Salah Al Hejailan, 'The New Saudi Arbitration Act: A Comprehensive and Article-by-Article Review' (2012) 4 *International Journal of Arab Arbitration* 15, 42.

[393] Ahmed A Altawyan, 'The Legal System of the Saudi Judiciary and the Possible Effects on Reinforcement and Enforcement of Commercial Arbitration' (2017) 10 *Canadian International Journal of Social Science and Education* 269, 283-284.

[394] Under article 2 of the IRSAL 2017, this is 'the Court of Appeal originally competent to hear the dispute'.

[395] IRSAL 2017, article 17(1).

[396] SAL 2012, article 51(2).

[397] SAL 2012, article 52.

[398] SAL 2012, article 53.

obligations under any international convention to which it is a party, which most importantly includes the NY Convention. Subject to those international obligations, the court shall refuse to enforce an award if it conflicts with the judgment or decision of a court, committee or commission with jurisdiction in Saudi to decide the dispute. Again, the court has jurisdiction to refuse to enforce an award where it is contrary to public policy or *Sharia*.

On the issue of enforcement, the SAL 2012 lacks detail, particularly regarding the requirements of Saudi's international commitments. Zegers makes the reasonable point that: 'An important opportunity has therefore been missed to address explicitly the procedure for enforcement of foreign awards and to reiterate the limited grounds on which such awards may be refused enforcement under the relevant international agreements to which Saudi Arabia is party'.[399] The Chairman of the ICC Saudi Arbitration Committee has also made an appeal for a clear and simple procedure for enforcing foreign awards.[400]

As a final point, it should be noted that the Enforcement Law 2012 provides for a new and specific enforcement jurisdiction that replaces the old procedure of enforcement by the Board of Grievances.[401] This should expedite enforcement proceedings and allow the judges to build up specific expertise. Under article 9, the Enforcement judge has jurisdiction to compel enforcement of an award, but under article 11, enforcement of foreign awards will only proceed on the basis of reciprocity.

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[399] Jean-Benoit Zegers, 'National Report for Saudi Arabia', in: Jan Paulsson (ed) (Kluwer Law International 1984, Supplement No 75 2013) *International Handbook on Commercial Arbitration* 1, 42.

[400] Khalid Alnowaiser, 'The New Arbitration Law and its Impact on Investment in Saudi Arabia' (2012) 29 *Journal of International Arbitration Law* 723, 724.

[401] Royal Decree No M/53 2012.

2.3.5 The approach to jurisdiction under the SAL 2012

Any system of arbitration should be designed to reflect the interests and needs of the principle stakeholders. Since these may not always coincide, there are likely to be tensions regarding any particular approach, and it is unlikely that all parties will be in agreement about the features given prominence. Nevertheless, it is possible to identify the central or core attributes. At the very least, the stakeholders must have confidence in the system, which means that it must provide a just, reliable, effective and efficient means of resolving disputes. Furthermore, since ICA is designed to resolve contractual disputes the system should reflect the underlying philosophy of contractual relationships. This means it should respect the autonomy of the parties, both individually and jointly within the context of the contract and arbitration agreement. The way in which the legal framework provides for the norms of cost-effectiveness, justice and party autonomy, however, will be shaped by the social, cultural and historical context of the jurisdiction.[402] In the Saudi context, the legal rules must be consistent with *Sharia* and must overcome any institutional inertia or resistance to the changes introduced by the SAL 2012, which might otherwise be restrictively interpreted and applied.

Under the SAL 2012, supported by the Enforcement Law 2012, Saudi has established a system, at least in the context of jurisdiction, that has moved from a jurisdictional model to one that now firmly reflects a hybrid approach. The role of the courts has been diminished, with clear recognition afforded to the authority of arbitration tribunal, as indicated by the inclusion of the principles of competence-competence and separability. The court's role is now essentially to legitimise and support the process of arbitration and its jurisdiction has been modified accordingly, largely reflecting the structure of the model law. The court's role will be considered further in subsequent chapters. It should, however, be noted that, in pursuit of the commercial developments envisaged under Vision 2030, a more arbitration friendly approach may be predicted following the recent introduction of specialised enforcement courts and

[402] David Nelken, Johannes Feest, 'Introduction to Part One' in David Nelken, Johannes Feest (eds) *Adapting Legal Cultures* (Hart Publishing 2001) 3.

commercial courts,[403] along with the positive impact that the new Saudi Centre for Commercial Arbitration (SCCA) is likely to have on a pro-arbitration culture.[404] Some confirmation for this optimism is provided by the Saudi Ministry of Commerce and Investment, which recently included the SCCA's arbitration clause in three of the Ministry's model contracts.[405]

In shifting from the jurisdictional to the hybrid model, 'the new Law represents a more liberal approach to arbitration',[406] which is consistent with the institutional changes highlighted above. Furthermore, it is arguable that such an approach, which facilitates the use of arbitration is more consistent with the *Sharia*,[407] which considers arbitration a valuable means of resolving disputes[408] and seeks to make life easier by not creating unnecessary difficulties or barriers to the prevent the use of useful facilities or mechanisms.[409] In so doing, it affords greater respect for party autonomy,[410] but could

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[403] Civil Procedures Law 2013, Royal Decree No M/1; Ahmed Basrawi, 'Saudi Arabia: The Development of the Judicial Systemin Saudi Arabia under Vision 2030' (2018) *Mondaq* <http://www.mondaq.com/saudiarabia/x/696538/trials+appeals+compensation/The+Development+Of+The+Judicial+System+In+Saudi+Arabia+Under+Vision+2030> accessed 18 July 2018.

[404] Cabinet Decree No 257 of 2014; Council of Saudi Chambers, 'Council Announces Board of Saudi Arbitration Centre' (Online, 15 July 2014) Council of Saudi Chambers <http://www.csc.org.sa/English/News/Pages/14ye12.aspx> accessed 18 July 2018; John Balouziyeh, 'Judicial Reform in Saudi Arabia: Recent Developments in Arbitration and Commercial Litigation' (31 December 2017) *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2017/12/31/judicial-reform-saudi-arabia-recent-developments-arbitration-commercial-litigation> accessed 18 July 2018.

[405] SCCA, 'Reflecting Support and Trust in Institutional Arbitration in Saudi Arabia: SCCA Arbitration Clause in MCI's Model Contracts' (03 June 2018) Saudi Centre for Commercial Arbitration <https://www.sadr.org/news-details/35> accessed 18 July 2018.

[406] Jean-Pierre Harb, Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 *Journal of International Arbitration Law* 113, 128.

[407] Shaheer Tarin, 'An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices' (2015) 26 *American Review of International Arbitration* 131, 132.

[408] Holy Qur'an, chapter 4, verse 35; Mutasim Ahmad Alqudah, 'The Impact of Sharia on the Acceptance of International Commercial Arbitration in The Countries of the Gulf Cooperation Council' (2017) 20 *Journal of Legal, Ethical and Regulatory Issues* 1, 4.

[409] Holy Qur'an, chapter 2, verse 185.

[410] Jean-Pierre Harb, Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 *Journal of International Arbitration Law* 113, 127.

have gone even further. Rather than simply following the Model Law, the SAL 2012 could have followed the Scottish Act and chosen to allow the parties greater choice and power within the process of arbitration. Allowing an appeal to the court on the grounds of legal error and making the appeal subject to the parties' agreement would serve both to enhance the legitimacy of the arbitration award while also showing greater respect for party autonomy.[411]

A similar flexibility could be introduced at other points in the process. For example, the SAL 2012 could have followed the Scottish Act and allowed an application to the court to determine a point of law prior to the final award being made. Provided the arbitration process is not halted, such an approach could increase the efficiency of the process. Allowing the parties to determine the availability of the application would also enhance party autonomy and move arbitration in Saudi more towards the contractual end of the hybrid model.

The application of the competence-competence principle, and the doctrine of the separability, could also be made subject to the parties' agreement as in the English Act. However, it was a huge step to simply incorporate these principles for the first time in Saudi law. It may be unwise to then appear to pull back from a commitment to the authority of the arbitration tribunal by allowing the parties to control how far the court is involved in determining the tribunal's jurisdiction. It may, therefore be better for such a step to be taken at some point in the future when the SAL 2012 has bedded in and the effect of the changes can be more fully assessed.

Establishing the new enforcement courts with a very specific jurisdiction to enforce the arbitration award is a commendably progressive step. The judges in such courts should develop sufficient expertise to enhance the efficiency and the effectiveness of the arbitration process. The efficiency of the process could be further enhanced by

[411] See further: 5.6.3; 5.7; 6.2; 6.3.

following the Scottish Act and creating arbitration appointment referees, which would reduce the need for court intervention during the preliminary stage of the process. Again, the involvement of the referees could be made subject to the parties' agreement so enhancing both efficiency and party autonomy. As a further institutional change, an internal arbitration appeals mechanism could be established under the auspices of the SCCA, which could deal not just with appeals against the award, but also consider appeals regarding issues of jurisdiction.[412]

2.4 Conclusion

Like the Model Law, the Scottish Act is best characterised as a hybrid approach, which is unsurprising, given that the Scottish Act builds on the English Act and draws directly on the Model Law.[413] Both the Scottish Act and the Model Law also lean more towards the contract, rather than jurisdictional, end of the spectrum within the hybrid category. However, there are some significant differences and, for the most part, the Scottish Act is more nuanced towards respecting party autonomy and the independence of the arbitration process. Although the Scottish Act allows greater recourse to the courts, this is subject to the parties' agreement, or the tribunal's authority and evidence that it will benefit the arbitration process.

As discussed above, there are several points where the parties are afforded greater power under the Scottish Act to adapt the process to their joint needs. This respect for party autonomy is further supplemented by the creation of arbitration appointment referees. The Scottish Act, however, is not entirely consistent. Precluding any opt-out from the separability and competence-competence provisions follows the Model Law, but is unduly restrictive of party autonomy. It may be countered that those

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[412] For further discussion see: 6.3.

[413] Hong-Lin Yu, 'A Departure from the UNCITRAL Model Law – The Arbitration (Scotland Act 2010 and Some Related Issues' (2010) 3 *Contemporary Asia Arbitration Journal* 283, 290-291; Scottish Parliament, *Arbitration (Scotland) Bill Policy Memorandum* (2009), para 6 <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16034.aspx> accessed 30 November 2017.

principles are so central to the independence of the arbitration process that the parties should not be free to opt out of them. However, this favours the institution of arbitration over party autonomy, which is further compromised by the anomaly of r.70(3).

It should also be remembered that the Scottish Act relies on the courts' discretion to interpret the provisions. Thus, much depends on how interventional the courts choose to be. This should be influenced by the philosophy behind the statute, made explicit by the inclusion of the Founding Principles in s.1. Equally, a general legal culture of support for arbitration is likely to be reflected in the judicial approach. However, regardless of the pro-arbitration stance of the Act, the courts still retain the discretion to intervene to a greater or lesser extent.

The SAL 2012 brings Saudi Arabia into line with the general approach to arbitration within the international community. Consistent with the first subsidiary hypothesis, the courts' jurisdiction has been significantly curtailed, with greater authority and independence delegated to the arbitration tribunal. The SAL 2012 is a major advance for the regulation of arbitration in Saudi, resolving many of the heavily criticised jurisdictional issues under the SAL 1983. Final judgment will have to be reserved until the full effect of the law can be seen in practice. However, the SAL 2012 is certainly a huge step in the right direction and the process of arbitration now sits firmly within the generally applicable hybrid model, providing a reasonable balance between justice, party autonomy and cost-effectiveness.

Although providing a significant improvement over the regime under the SAL 1983, the legal framework established by the SAL 2012 is not fully consistent with the second and fifth subsidiary hypotheses. In reforming the SAL 1983, it could have gone further and, following the Scottish and English Acts, allowed a more flexible approach granting the courts additional jurisdiction contingent on the agreement of the parties. Given the infancy of the hybrid model approach within Saudi's regulation of arbitration, it is understandable that the SAL 2012 closely follows the model law,

rather than the more radical approach of the Scottish and English Acts. Allowing the parties greater control over the applicability of the principles of competence-competence and separability is better deferred until it is clear that the judiciary have developed a more pro-arbitration culture, although the impact of this may be mitigated by establishing an internal arbitration appeals mechanism that can deal, *inter alia*, with jurisdictional issues. It is, however, unfortunate, that the SAL 2012 did not allow the parties to decide for themselves whether to allow an application to the courts on a point of law, or an appeal against the award on the ground of legal error. It is also unfortunate that it did not follow the Scottish Act and establish the role of arbitration appointment referee, which would provide an alternative to relying on the less efficient route of involving the court in establishing the tribunal.

Despite those criticisms, the SAL 2012 has re-addressed the jurisdictional balance between the courts and the tribunal that was so strongly criticised under the SAL 1983. There is, however, still some fine tuning that could serve to further improve the balance between the three core principles, particularly the cost-effectiveness of the process and its respect for party autonomy. Having considered the regulation of jurisdictional issues in this chapter, chapter three focuses on the regulation of arbitration agreements. Consistent with the approach throughout this thesis, but with an emphasis on autonomy, the analysis in chapter three examines how well the legal framework established by the SAL 2012 balances the principles of autonomy, justice and cost-effectiveness.

Chapter Three: Examination of the Core Principles in the Context of Arbitration Agreements

3.1 Introduction

In chapter two, the analysis of jurisdictional issues suggested that the SAL 2012 is a significant advance over the SAL 1983. Although much still depends on developing a supportive pro-arbitration culture, the SAL 2012 goes a long way to restricting the power of the Saudi courts to interfere in the arbitration process. While arbitration remains anchored to the national legal system, the balance of power between arbitration and the legal system is now more consistent with the expectations of the international arbitration community, with Saudi arbitration readily characterised as a hybrid model. Although improving on the previous regime, the comparison with Scots law suggests that the SAL 2012 is more rigid than it needs to be. Particularly, the SAL 2012 could have allowed the parties greater control over the jurisdictional issues. This highlights the issue of party autonomy and control over the arbitration process, at the heart of which lies the arbitration agreement.

In the first half of this chapter the analysis focuses on the nature of an arbitration agreement, its limits and justification. As part of this analysis, the relevance of different conceptions of autonomy will be examined. Since different cultural understandings of autonomy may explain and justify different approaches to the law, this includes a consideration of both Islamic and Western conceptions of autonomy. This examination of autonomy and the arbitration agreement allows the construction of an ideal model, which provides a tool to facilitate the comparative analysis of the SAL 2012. The comparative analysis is set out in the second half of the chapter. It begins by examining the approaches to the arbitration taken by the Model Law, the Scottish Act and the SAL 2012. The discussion then explores the regulatory approaches to the role of the court before analysing the power afforded to the parties to determine the arbitration process. The chapter is drawn to a conclusion by a consideration of how the SAL 2012 might be improved.

3.2 The Nature of Arbitration Agreements

3.2.1 The arbitration agreement

An arbitration agreement is a private commitment by two or more parties to relinquish any right to submit a dispute to a judicial forum, such as a national court, and instead to resolve any relevant disputes by arbitration. The agreement may be made *ex ante*, when it will usually be documented as a clause contained within the main contract between the parties. Where such a clause is absent, the parties may nevertheless make an *ex post* submission agreement to resolve a dispute by arbitration.[414] Like any contractual device,[415] an arbitration agreement alters the rights and obligations between the parties. This allows the parties to 'create their own private system of justice'.[416]

The legal rights and obligations are those necessary to allow the dispute to be resolved by arbitration and include the right to submit a dispute to arbitration and an obligation to comply with both the agreed process of arbitration and the decision of the arbitrators. In establishing the arbitration process, the parties must agree on: the rules governing the process; the location; the language to be used; the national law, or *lex arbitri*, and the arbitrators. Through the arbitration agreement, the parties contractually agree to transfer the legal power to resolve the relevant dispute from the national court to the arbitrators.[417]

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[414] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) 17.

[415] Henry P de Vries, 'International Commercial Arbitration: A Contractual Substitute for National Courts' (1982) 57 *Tulane Law Review* 42.

[416] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) 17.

[417] Henry P de Vries, 'International Commercial Arbitration: A Contractual Substitute for National Courts' (1982) 57 *Tulane Law Review* 42, 43; Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) 17.

Consistent with the private nature of the arbitration agreement within the context of a national legal framework, '[t]he agreement to submit disputes to arbitration is governed by two intertwining principles: party autonomy and the contractual nature of the agreement'.[418] As discussed below, the parties' power to make the agreement, as with all contracts, derives from the capacity and right to autonomy. The contractual nature of the agreement, which is facilitated and regulated by the national legal framework, relies on a negotiation between parties to arrive at a mutually acceptable agreement that complies with the legal requirements for a valid contract.[419]

3.2.2 The justification behind the arbitration agreement

The essential justification for arbitration lies in the two related principles of autonomy and liberty. Arbitration is etymologically related to autonomy and, as Paulsson explains: '[t]he argument for arbitration begins with respect for private arrangements'.[420] Whether arbitration, as an alternative to litigation, is supported by the state, depends on the ideology and political will of that state.[421] It crucially relies on the acceptance that private parties should be free to resolve their own disputes, provided they can do so in a way that does not harm society.

While submitting to the law is a matter of authority, submitting to arbitration is a matter of consensual participation. Arbitrators gain their authority from the parties' legally enforceable agreement, which is normatively predicated on autonomy and consent.[422] It is the power of autonomy that allows the parties, consistent with the national legal framework, to construct an arbitration agreement that satisfies their

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[418] Julian DM Lew, 'Arbitration Agreements: Form and Character' in Petar Sarcevic (ed*), Essays on International Commercial Arbitration* (Graham & Trotman 1989) 51.

[419] Julian DM Lew, 'Arbitration Agreements: Form and Character' in Petar Sarcevic (ed*), Essays on International Commercial Arbitration* (Graham & Trotman 1989) 51, 52.

[420] Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013), 1-2.

[421] Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013) 2.

[422] Jonathan Mance, 'Arbitration: a Law unto itself?' (2016) 32 *Arbitration International* 223, 224.

mutual needs.[423] It is the responsibility flowing from autonomy that obliges the parties to respect the agreement, submit to the arbitration process, accept the decision and honour the award.

Because the freedom to make an arbitration agreement is predicated on autonomy, it is important to understand the nature and extent of the concept to appreciate its implications for arbitration. Autonomy, however, is a contested concept, with many competing conceptions.[424] These different approaches to autonomy may have important implications for arbitration agreements, the parties' rights and obligations and the legitimate role for the state to support the arbitration process through facilitation, regulation and enforcement.[425] Examining the concept of autonomy and its relevance for the arbitration agreement is particularly important since much of the arbitration literature treats autonomy as a fully determined concept with a unitary meaning.[426]

3.2.2.1 Autonomy

The basic idea of autonomy is straightforward. Deriving from the Greek for self-rule, the essence of autonomy is self-determination and 'authority over one's choices and actions'.[427] It is here, however, that any consensus ends.[428] Although there are many variations on the theme of autonomy, for the purposes of this thesis, the differing

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[423] Michael F Hoellering, 'International Arbitration Agreements: A look behind the scenes' (1998) 53 *Dispute Resolution Journal* 64.

[424] Christa Roodt, 'Autonomy and due process in arbitration: recalibrating the balance' (2011) 44 *Comparative & International Law Journal of Southern Afric*a 311, 314.

[425] Hiro N Aragaki, 'Does Rigorously Enforcing Arbitration Agreements Promote "Autonomy"?' (2016) 91 *Indiana Law Journal* 1143, 1146.

[426] See, eg, Karl-Heinz Bockstiegel, 'The Role of Party Autonomy in International Arbitration' (1997) 52 *Dispute Resolution Journal* 24, 25; Ar Gor Seyda Dursun, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of its Role and Extent' (2012) 1 *Yalova Universitesi Hukuk Fakultesi Dergisi* 161.

[427] Marina Oshana, 'How Much Should We Value Autonomy?' in Ellen Frankel Paul, Fred D Miller, Jr, Jeffrey Paul (eds) *Autonomy* (Cambridge University Press 2003) 99, 100.

[428] See, G Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988).

conceptions may be broadly grouped into three categories[429] These categories are broadly distinguished by the degree of liberty allowed to the individual and, conversely, the extent to which the state may be justified in limiting individual liberty and self-determination. These three groups will be labelled as libertarian, liberal or social autonomy.

The libertarian conception of autonomy simply means self-determination, while the liberal view includes a requirement for rationality. For both the liberal and the libertarian forms of autonomy, the state is justified in limiting autonomy only to prevent harm to others. The liberal conception of autonomy would also justify state intervention to protect individuals who lack the capacity for rational self-determination. The third category conceives of autonomy as inevitably grounded in a richer social context that positions the individual within a network of personal and societal relationships. Individual autonomy is seen as both reliant on, and constrained by, those relational others.[430] Because this view sees individual autonomy as embedded in society, it arguably justifies a greater role for the state than under the liberal or libertarian conceptions (see section 3.2.2.3).

The point of identifying these different approaches is to highlight that autonomy is a socially-constructed and contested concept. Each conception reflects the ideological biases of those who argue for their view of autonomy. The different ideologies are reflected in both the meaning of autonomy and its limits. Since the arbitration agreement is predicated on a respect for party autonomy, it is important to appreciate that the meaning and limits of the agreement are crucially dependent on how autonomy is conceived. This, in turn, defines the extent to which it is legitimate for the state to interfere in the arbitration process. Thus, the relationship between the

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[429] Alasdair Maclean, *Autonomy, Informed Consent and Medical Law* (Cambridge University Press 2009), 9-22.

[430] See the collection of essays in: in Catriona Mackenzie, Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press 2000).

authority of the arbitration agreement and the authority of the national courts is derivative of the conception of autonomy. As such, it is unfortunate that, despite being a normative and culturally-laden concept, autonomy is often relied on as a justification without further explication.[431]

Consider Carbonneau's explanation that:

> The law of arbitration ostensibly emphasizes individual responsibility and accountability when it provides that arbitration agreements will be enforced as written. It thereby reduces the role of the state and the prospect of state regulation. The marketplace becomes the central purveyor of norms.[432]

Although he does not here explicitly refer to party autonomy, the concept underpins the quote. He subsequently notes: 'the central significance of party autonomy in the process of international commercial arbitration',[433] but this reference to autonomy is not explained any further. His explication, however, reflects a conception of autonomy situated towards the liberal/libertarian end of the spectrum. The parties are characterised as idealised rational decision-makers, who should be free to commit to arbitration agreements, without state interference and subject only to market regulation. This approach is entirely consistent with Anglo-American law and

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[431] Hiro N Aragaki, 'Does Rigorously Enforcing Arbitration Agreements Promote "Autonomy"?' (2016) 91 *Indiana Law Journal* 1143, 1148. See, eg, Rachel Engle, 'Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability' (2002) 15 *The Transnational Lawyer* 323.

[432] Thomas E Carbonneau, 'The Exercise of Contract Freedom in the Making of Arbitration Agreements' (2003) 36 *Vanderbilt Journal of Transnational Law* 1189, 1195.

[433] Thomas E Carbonneau, 'The Exercise of Contract Freedom in the Making of Arbitration Agreements' (2003) 36 *Vanderbilt Journal of Transnational Law* 1189, footnote 34.

neoliberal capitalism,[434] which constituted the dominant Western institutional influence when this article was written in 2003.[435]

Other Western authors also rely on a liberal approach to the concept of autonomy.[436] Watt, for example, notes that: 'party autonomy developed ... as an essential component of the liberal model of market regulation'.[437] When this approach to international commerce is applied to arbitration, it creates the ideal of arbitration determined by party autonomy through the arbitration agreement unfettered by state intervention. The consequence of this is a 'neo-liberal model of private governance' grounded in an economically valuable market for the business of arbitration in which nation-states must compete by liberalising their domestic laws and removing constraints imposed on party autonomy to meet the needs and interests of international commerce.[438] The arbitration agreement becomes essentially a matter of cooperation between private parties, empowering these autonomous agents and curtailing the power of national governments, whose role is restricted to facilitation and enforcement.[439] This Western model of arbitration is reflected in both the Model

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[434] Arthur Chrenkoff, 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 *Australian Journal of Legal Philosophy* 36, 54.

[435] See: Milton Friedman, *Capitalism and Freedom: Fortieth Anniversary Edition* (University of Chicago Press 2002), 4-5; David Harvey, 'Neoliberalism as Creative Destruction' (2007) 610 The *Annals of the American Academy of Political and Social Science* 22, 23.

[436] See, eg Hiro N Aragaki, 'Does Rigorously Enforcing Arbitration Agreements Promote "Autonomy"?' (2016) 91 *Indiana Law Journal* 1143; Moses Oruaze Dickson, 'Party autonomy and justice in international commercial arbitration' (2018) 60 *International Journal of Law and Management* 114, 116-120.

[437] Horatia Muir Watt, '"Party Autonomy" in international contracts: from the makings of a myth to the requirements of global governance' (2010) 6 *European Review of Contract Law* 250, 254.

[438] Horatia Muir Watt, '"Party Autonomy" in international contracts: from the makings of a myth to the requirements of global governance' (2010) 6 *European Review of Contract Law* 250, 260-261. See also, Giuditta Cordero-Moss, 'Limits on Party Autonomy in International Commercial Arbitration' (2015) 4 *Penn State Journal of Law & International Affairs* 186.

[439] Kenneth R Davis, 'A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Power' (1999) 26 *Fordham Urban Law Journal* 167, 168-169; Hiro N Aragaki, 'Does Rigorously Enforcing Arbitration Agreements Promote "Autonomy"?' (2016) 91 *Indiana Law Journal* 1143, 1160-1161. But, see section 3.2.4.

Law and the NY Convention,[440] creating a competitive and normative pressure on all states to develop their own domestic regulation consistently with that model. The development of domestic regulation, however, will also be subject to the cultural norms of the individual country. In Saudi Arabia, Islam provides the main cultural constraint on the development of a regulatory framework driven by secular international norms. It is, therefore, important to understand the meaning of autonomy in Islam.

3.2.2.2 Islam and autonomy

Under Islam, humans are individuals with free will, physical needs and emotional desires. For the human being's immortal soul to live alongside the faithful and good in the 'Gardens of Perpetuity',[441] each person must follow Allah's path (the *Sharia*). By following the *Sharia* faithfully, Muslims will be guided along a way of moderation that will balance and satisfy the needs of the body, the emotions, the will and the soul to achieve a state of harmony.[442]

The free will and rationality that are characteristic of human beings in Islamic ontology,[443] is of fundamental importance with each person responsible for their own choices. This recognised in the Holy *Qur'an,* which states, for example, that: 'Surely Allah changes not the condition of a people, until they change their own condition'.[444] Indeed, the first choice for Muslims is to decide whether to accept Allah as their Lord

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[440] Giuditta Cordero-Moss, 'Limits on Party Autonomy in International Commercial Arbitration' (2015) 4 *Penn State Journal of Law & International Affairs* 186, 188.

[441] The Holy *Qur'an,* chapter 98, verses 7-8. See also, chapter 43 verses 69-73: English translation by Maulana Muhammad Ali (2002) <http://www.muslim.org/english-quran/quran.htm>, accessed 30 November 2017.

[442] Suzanne Haneef, *What Everyone Should Know About Islam and Muslims* (14th edn, Library of Islam 1996) 11-12.

[443] Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28 *Loyola of Los Angeles International and Comparative Law Review* 565, 579; Shadiya Baqutayan, 'The Innovation of Human Nature in Islam' (2012) 2 *International Journal of Social Sciences and Education* 162.

[444] The Holy *Qur'an*, chapter 13, verses 11: English translation by Maulana Muhammad Ali (2002) <http://www.muslim.org/english-quran/quran.htm>, accessed 30 November 2017.

and be 'bound by the standards, criteria and laws of God alone'.[445] Prior to this choice, the Islamic conception of human free will appears consistent with the liberal/libertarian view. Once Allah is accepted then autonomy becomes bounded by the demands of *Sharia*, and more closely resembles the social conceptions of autonomy that ethically constrain self-determination.

The ethical dimension of Islam acknowledges the context of individual existence, which has both a social earthly dimension and an afterlife that ground a responsibility to the self, to others, and also to the community whose fate rests in their hands.[446] Islam grounds a form of relational autonomy 'based on belief, love, mutual respect, assistance, and understanding instead of ... realization of personal interest'.[447] The Islamic conception of autonomy, then, is a relational autonomy established within the faith-based, community-situated framework of *Sharia* that encompasses all aspects of life, including commercial activity.[448] This framework both supports and constrains individual self-determination and necessarily impacts on the making of contracts and arbitration agreements. As Wilson comments: 'The business decision-maker has free choice, but religious principles provide a framework for the appropriate exercise of that choice'.[449]

3.2.2.3 The relevance of different conceptions of autonomy

The importance of appreciating the different conceptions of autonomy lies in the impact that the differences have on the relationship between state and individual

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[445] Suzanne Haneef, *What Everyone Should Know About Islam and Muslims* (14th edn, Library of Islam 1996), 17.

[446] Fethullah Gulen, 'A Comparative Approach to Islam and Democracy' (2001) 21 *The SAIS Review of International Affairs* 133, 135.

[447] Fethullah Gulen, 'A Comparative Approach to Islam and Democracy' (2001) 21 *The SAIS Review of International Affairs* 133, 137.

[448] Mark Halstead, 'An Islamic concept of education' (2004) 40 *Comparative Education* 517, 524.

[449] Rodney Wilson, 'Islam and Business' (2006) 48 *Thunderbird International Business Review* 109, 113.

sovereignty. The liberal and libertarian conceptions prioritise the individual over the community, emphasising the liberty of the autonomous person to pursue his or her goals. This autonomy is limited only by the respect due to other autonomous agents and the role of the state is restricted to those interventions necessary to provide a socio-legal framework that supports the smooth running of society.

At its most extreme, a libertarian conception of autonomy is consistent with the autonomous model, with arbitration seen entirely as matter for the parties to determine through a *sui generis* arbitration agreement.[450] This approach sees arbitration as entirely private, with no role for the state's public policy concerns. A more liberal conception is consistent with the contractual model. This acknowledges a role for the state, but accepts only a minimal harm-based role for public policy.[451] Under this harm principle, the state should not exercise its power based on concerns for the moral or spiritual well-being of individuals, who are absolutely 'sovereign' over those things that affect only themselves.[452]

In contrast to the limited role for the state under the libertarian and liberal conceptions, social and moral conceptions of autonomy, such as the Islamic view, are more consistent with the hybrid or jurisdictional models, allowing the state and public policy a more expansive role. The Muslim's commitment to Islam, as discussed above, entails obedience to the *Sharia*, in both its narrow sense as the basis for Islamic law and its widest sense as a way of life. Under the *Sharia*, an Islamic state has a responsibility for both social justice and the support of individuals in their journey towards the state of spiritual perfection that is the aim of all faithful Muslims. Muslim autonomy is necessarily constrained by this commitment to Islam and the guidance of the *Sharia*. Since this applies in all areas of life, including the commercial context,

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[450] See section 2.2.

[451] See, John Stuart Mill, 'On Liberty' (1859), in J Gray (ed), *On Liberty and Other Essays* (Oxford University Press 1998) 5, 14; Joel Feinberg, *Harm to Others* (Oxford University Press 1984), 12.

[452] John Stuart Mill, 'On Liberty' (1859), in J Gray (ed), *On Liberty and Other Essays* (Oxford University Press 1998) 5, 14.

the freedom of the Muslim business person to enter into an arbitration agreement is contingent on the agreement being consistent with *Sharia*.

An Islamic state has a responsibility, not just for the smooth running of society, but also for the spiritual well-being of the community. When coupled with the *Sharia* constraint on the autonomy of individual Muslims, this provides the Islamic state with sufficient justification to exercise its power over the arbitration process to guarantee that it is consistent with *Sharia*. This includes limiting party autonomy to ensure that any agreement is *Sharia* compliant, bearing in mind that the *Sharia* is not intended to create unnecessary barriers that make life more difficult.[453] There are two key implications. First, while it is appropriate to critique Western legal frameworks by reference to Western conceptions of autonomy, the SAL 2012 should be judged against the Islamic conception of autonomy. Second, any proposals to reform the SAL 2012 must be consistent with an Islamic conception of autonomy.

3.2.3 The importance of the arbitration agreement

The arbitration agreement, which gives expression to party autonomy, has been described as 'the soul of arbitration'.[454] It is important because it affords the parties the freedom to determine the parameters of the arbitration process.[455] Crucially, it determines how the relevant dispute should be resolved.[456] Arbitration offers an alternative to litigation for resolving private international commercial disputes and that choice is effected through the arbitration agreement. The value of the agreement, therefore, is that it respects the parties' autonomy, empowering them to 'tailor the

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[453] The Holy Qur'an, chapter 2, verse 185.

[454] Zh Stalev, 'The Arbitral Tribunal Vis-a-Vis the Arbitration Agreement' (1990) *4243 Revue Hellenique de Droit International* 233.

[455] Henry P de Vries, 'International Commercial Arbitration: A Contractual Substitute for National Courts' (1982) 57 *Tulane Law Review* 42, 50; Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013) 16.

[456] Julian DM Lew, 'Arbitration Agreements: Form and Character' in Petar Sarcevic (ed*), Essays on International Commercial Arbitration* (Graham & Trotman 1989) 51, 54.

arbitral process' to meet their own needs as mutually agreed.[457] The freedom, flexibility and certainty that accompany a process centred on party autonomy makes arbitration a stable and commercially attractive alternative to litigation.[458]

Through the arbitration agreement, the parties transfer the authority to resolve a particular dispute from the courts to the arbitrators, whose jurisdiction derives from the agreement.[459] With the support of the national legal system, the arbitration agreement and any subsequent award are legally enforceable, making the arbitration agreement important because it both respects individual autonomy and establishes jurisdiction.[460] Furthermore, the arbitration agreement is important because of the effect it has on the parties.

As an expression of autonomy, the arbitration agreement creates a relationship between the parties, or helps to define and cement a wider contractual relationship. An agreement entails a commitment by all parties who consent to the terms of the agreement, and hence to the process of arbitration defined by the agreement. This commitment does not just act to provide the chosen arbitrators with the authority to resolve the relevant dispute, but also obliges both parties to respect and honour the agreement. At the least, this precludes either party from unilaterally withdrawing from the agreement, which embodies both a moral and legal commitment.[461] This

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[457] Mia Louise Livingstone, 'Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact' (2008) 25 *Journal of International Arbitration* 529, 530.

[458] See, Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28 *Loyola of Los Angeles International and Comparative Law Review* 565, 570. See also, Rachel Engle, 'Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability' (2002) 15 *The Transnational Lawyer* 323.

[459] Faisal M Al-Fadhel, 'Respect for Party Autonomy under Current Saudi Arbitration Law' (2009) 23 *Arab Law Quarterly* 31, 33.

[460] Maria Hook, 'Arbitration Agreements and Anational Law: A Question of Intent?' (2011) 28 *Journal of International Arbitration* 175. For a discussion of jurisdictional issues see chapter two.

[461] Margaret Gilbert, 'Agreements, coercion and obligation' (1993) 103 Ethics 679, 691-3. See also, Henry P de Vries, 'International Commercial Arbitration: A Contractual Substitute for National Courts' (1982) 57 *Tulane Law Review* 42, 60.

minimal commitment flows from a liberal conception of autonomy. More social or moral conceptions, such as relational or Islamic autonomy, justify additional reciprocal obligations to respect the interests of the other party and the relationship between them.[462] Through such a mutual and voluntary commitment to resolving any disputes by arbitration, the arbitration agreement may play an important role in maintaining a good commercial relationship between the parties.[463]

3.2.4 The limits of the arbitration agreement

3.2.4.1 Autonomy and public policy

Lew states that: '[p]arty autonomy gives contracting parties the power to fashion their own remedial process within the limits of public policy'.[464] The problem is that public policy is a vague, amorphous concept. If party autonomy and the authority of the arbitration agreement are to be limited by public policy, then the policy issue must be capable of justification. It should also be of sufficient importance to outweigh the value of individual autonomy.

Since autonomy provides the justification for situating the jurisdictional authority of the arbitrators in the arbitration agreement, then the limits of the agreement should be broadly consistent with the limits to autonomy. Regardless of which conception is relied on, autonomy is limited by the social context of our existence. Within any community, one person's autonomy is necessarily limited by the obligation not to unjustly interfere with another person's autonomy or to wrongly cause the other

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[462] Ian R Macneil, *The New Social Contract: An Inquiry Into Modern Contractual Relations* (Yale University Press 1980), 64-70; Ian R Macneil, 'Relational Contract: what we do and do not know' (1985) *Wisconsin Law Review* 483, 503.

[463] Henry P de Vries, 'International Commercial Arbitration: A Contractual Substitute for National Courts' (1982) 57 *Tulane Law Review* 42, 62.

[464] Julian DM Lew, 'Arbitration Agreements: Form and Character' in Petar Sarcevic (ed*), Essays on International Commercial Arbitration* (Graham & Trotman 1989) 51.

person harm,[465] defined as a setback to that person's interests.[466] This does not preclude fair competition, but does justify state interference to restrict the parties' freedom to gain an advantage through, for example, fraud, coercion, misrepresentation.

This harm principle may also justify restricting autonomy to prevent harm to the wider community, although only where non-trivial interests are threatened.[467] For the liberal/libertarian conceptions, the harm principle provides the sole justification for limiting individual autonomy, allowing public policy exceptions precluding arbitration in, for example, situations that engage the criminal law. It could also justify public policy exceptions for contracts involving goods and services that may justifiably be characterised as causing harm to the community. This includes those activities prohibited, for that reason, by the *Sharia*, including pornography, alcohol and gambling.

For moral conceptions of autonomy, public policy exceptions are widened beyond the issue of harm to include a concern for public morality. For the Islamic conception, public policy should relate to the *maqasid al Sharia* (the objectives of *Sharia*), which are centred on three concerns: the development of individual character; justice (*adl*) and public interest (*maslahah*).[468] The six *maqasid* are: preservation of life, property, family, religion, dignity, and rational knowledge.[469] Provided the public policy furthers one of these, a restriction of autonomy, and hence the arbitration agreement, is justified. Furthermore, both as a matter of public morality and the prevention of

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[465] John Stuart Mill, 'On Liberty' (1859), in J Gray (ed), *On Liberty and Other Essays* (Oxford University Press 1998) 5, 14.

[466] Joel Feinberg, *Harm to Self* (Oxford University Press 1986), 10.

[467] Joel Feinberg, *Harm to Self* (Oxford University Press 1986), 10-11.

[468] Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28 *Loyola of Los Angeles International and Comparative Law Review* 565, 588.

[469] Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28 *Loyola of Los Angeles International and Comparative Law Review* 565, 586.

community harm, those things prohibited by the *Sharia* may also constitute a public policy exception. Apart from the *Sharia* prohibitions noted above, the obvious exception is the prohibition of *riba* (interest).[470] In addition to *riba*, *Sharia* also prohibits *gharar* (uncertainty).[471] Arbitration agreements that involve *riba* or lack sufficient certainty, may be invalidated under *Sharia*.[472]

Beyond the public policy exceptions to the validity of an arbitration agreement, *Sharia* may also impact on the parties' freedom to determine the arbitration process. The freedom to appoint arbitrators may be limited, and may require male Muslim arbitrators with a knowledge of *Sharia*.[473] This, however, is controversial and the approach is not uniform. The *Hanafi* school, for example, allows female arbitrators and some scholars have argued that it is acceptable to use non-Muslim arbitrators provided any award is *Sharia* compliant.[474] It should be noted that Saudi follows the *Hanbali* school,[475] and while women were not explicitly excluded under the SAL 1983, in practice they were not accepted as arbitrators. Al-Fadhel notes that the Holy *Qur'an* places more value on the testimony of a man and suggests that the reluctance to accept female arbitrators derived from the historic law based on the *Hanbali* school, which required arbitrators to have the same qualifications as judges.[476]

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[470] See Chapter two, verse 275 of the Holy Qur'an. See also, eg, Erdem Bafra, 'Prohibition of "Riba" Over against Time Value of Money in Islamic Banking' (2014) 2 *Izmir Review of Social Sciences* 75.

[471] Mohammed I Aleisa, 'A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?' (PhD thesis, University of Essex 2016), 184.

[472] Mahmoud A El-Gamal, *Islamic Finance: Law, Economics and Practice* (Cambridge University Press 2006), 8.

[473] Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28 *Loyola of Los Angeles International and Comparative Law Review* 565, 606.

[474] Ahmad Alkhamees, 'International Arbitration and Sharia Law: Context, Scope, and Intersection' (2011) 28 *Journal of International Arbitration* 255, 259.

[475] Ahmad Alkhamees, 'International Arbitration and Sharia Law: Context, Scope, and Intersection' (2011) 28 *Journal of International Arbitration* 255, 257.

[476] Faisal M Al-Fadhel, 'Respect for Party Autonomy under Current Saudi Arbitration Law' (2009) 23 *Arab Law Quarterly* 31, 52-53.

In addition to restrictions on the choice of arbitrators, *Sharia*, as a divine system of laws does not recognise any freedom of choice that prefers a different law. In Saudi, this has led, under the SAL 1983, to the automatic application of Saudi law regardless of the parties' agreement. However, the choice of a non-Islamic law may be acceptable under the principle of necessity in countries where *Sharia* law does not apply.[477] This follows because the parties would be unable to choose *Sharia* law and, by necessity, would have to rely on an alternative. This means that any awards made on this basis should be enforced within Saudi. Beyond this, the position needs further analysis to determine whether a choice of law is compatible with the *Sharia*.[478] Such an analysis is beyond the scope of this thesis.

3.2.4.2 National law

Apart from the restrictions based on the justified limits of autonomy, the arbitration agreement may also be restricted by the national legal framework to ensure that the process of arbitration offers the certainty of formal justice. This is important because there must be sufficient confidence in the process to justify enforcement of arbitration awards by the national courts. This applies particularly to foreign awards.

In understanding the relationship between national law and arbitration it is important to appreciate that, barring the most caricatured libertarian conceptions, autonomy must exist within a social context. Part of that context is national law and politics. Rather than simply acting as a constraint on party autonomy, however, the national legal framework goes beyond defining the boundaries of the arbitration agreement to enable and facilitate the whole process of arbitration.[479] Given the dependence of enforcement on the national legal system, the absence of this supportive framework would make the unrestricted freedom to create an arbitration agreement a Pyrrhic

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[477] Ahmad Alkhamees, 'International Arbitration and Sharia Law: Context, Scope, and Intersection' (2011) 28 *Journal of International Arbitration* 255, 258

[478] Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28 *Loyola of Los Angeles International and Comparative Law Review* 565, 614.

[479] Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013) 2.

victory for party autonomy. What value is there in completely unfettered autonomy if the arbitration award is unenforceable?

While autonomy justifies arbitration as a type of private dispute resolution, the goal of arbitration is to resolve the dispute. This requires the arbitrator to make a just and final award, but the process will only work if the award is enforceable. While autonomy and enforceability are interacting rather than competing issues, there is a balance to made. Constraining autonomy within a supportive legal framework ensures a reasonable equilibrium between formal and substantive justice that protects the interests of both parties, facilitates a just procedure, enables a substantively just award and protects the public good.[480] In so doing, the facilitation of party autonomy within the national legal framework 'preserve[s] the integrity' of arbitration, providing a strong basis for arbitration awards to be accepted internationally.[481] As de Vries states: '[t]hough the most important principle of international commercial arbitration is the freedom of the parties … the process cannot be fully detached from national law'.[482]

3.2.5 A model of the arbitration agreement

A concept may be characterised by an underlying theory that explains its core attributes that serve to distinguish it from other similar concepts.[483] For present purposes, and based on the preceding discussion, the explanatory theory of the arbitration agreement is:

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[480] Mia Louise Livingstone, 'Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact' (2008) 25 *Journal of International Arbitration* 529, 532-533.

[481] Mia Louise Livingstone, 'Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact' (2008) 25 *Journal of International Arbitration* 529, 529, 535.

[482] Henry P de Vries, 'International Commercial Arbitration: A Contractual Substitute for National Courts' (1982) 57 *Tulane Law Review* 42, 72.

[483] Based on: Gregory L Murphy, Douglas L Medin, 'The role of theories in conceptual coherence' (1985) 92 *Psychological review* 289; Douglas L Medin, 'Concepts and conceptual structure' (1989) 44 *American psychologist* 1469.

A mutually binding reciprocal commitment, enabled and supported by the national legal framework, to define the parameters of the arbitration process and, through the autonomous consent of the parties, to transfer jurisdictional authority from the national courts to the chosen arbitrators.

This theory underlies the eight core attributes of the arbitration agreement: the parties; its form; its independence; its validity; its effectiveness; its subject matter; its content; and its effect.

First, any agreement requires at least two parties. In the context of ICA, the signatory parties to the agreement are likely to be the parties to a contract, with the arbitration agreement designed to determine how particular disputes arising out of the contract will be settled. Disputes arising out of a contract may, however, involve third parties who are not signatories to the arbitration agreement itself. This raises the question of whether non-signatories can compel arbitration between the signatories.[484] A further question is whether a non-signatory may be subject to the process of arbitration and arbitral award. In theory, the involvement of third parties must rely on a social or relational conception of autonomy rather than the more individualistic nature of liberal and libertarian autonomy, which support a stricter privity of contract.

Consider Watt's suggestion that support for third party involvement derives from 'the myth of an international community of merchants … [which] is enough to draw participants into a contractual network'.[485] This argument relies essentially on the relationship nexus within this international community, reflecting a relational conception of autonomy. A more liberal approach would require that the third party had agreed to the clause. For example, with regard to a choice of forum clause in a bill of lading, the European Court of Justice applied a liberal conception of autonomy, constrained by the national legal framework, to hold that a third party would only be

[484] In England, s 8 of the Contracts (Rights of Third Parties) Act 1999 allows a third party to be treated as a party to the arbitration agreement. In Scotland, s 9 of the Contract (Third Party Rights) (Scotland) Act 2017 will allow third parties to be treated as parties to the arbitration agreement when it comes into force.

[485] Horatia Muir Watt, '"Party Autonomy" in international contracts: from the makings of a myth to the requirements of global governance' (2010) 6 *European Review of Contract Law* 250, 274.

bound by the choice if they had 'succeed[ed] [by the effect of national law] to the rights and obligations of one of the original parties ... [or had] actually accepted the jurisdiction clause'.[486] Similarly, in *Dallah Real Estate and Tourism Holding Co v Religious Affairs of the Government of Pakistan*, the United Kingdom (UK) Supreme Court applied French Law to hold that, in the absence of explicit evidence, such as a signature, there must be sufficient evidence of a common intention that the party should be bound by the agreement.[487]

Second, in theory, the form of the agreement should be for the parties to determine. Thus, an agreement might be verbal or written, signed or unsigned, electronic or on paper. In practice, however, some restrictions, may be imposed for evidentiary certainty.

Third, the arbitration agreement is considered to be independent of the main contract between the parties. Where the agreement is contained as a contractual clause then the principle of separability means that the arbitration clause is treated as an agreement distinct from the main contract. As a consequence of this distinction, the validity of the arbitration agreement is not subject to the validity of the main contract.[488]

Fourth, to be effective the agreement must be valid. As with any legally binding agreement, the arbitration agreement gains its authority from the consent of the parties, which must be competent, voluntary, and informed. However, this authority

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[486] Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV and Others* [2000] ECR I-9362, 9375, para 27.

[487] *Dallah Real Estate and Tourism Holding Co v Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, 802, 806-807 per Lord Mance.

[488] *Heyman v Darwins Ltd* [1942] AC 356, 374; Hong-Lin Yu, *Commercial Arbitration: The Scottish and International Perspectives* (Dundee University Press 2011), 59-60.

must itself be recognised and supported by the national laws that provide the ultimate source of validity for the arbitration agreement.[489]

Fifth, if the agreement is to be of any value, then it must be effective. The agreement must demonstrate an intention to submit disputes to arbitration. It should also be sufficiently well defined to make clear that the agreed procedure is characterisable as arbitration.[490] In other words it must establish a framework that empowers an arbitration tribunal to produce a final and legally binding decision.[491] The agreement should also clearly define the scope of the arbitrators' jurisdiction, but legal jurisdictions generally supportive of arbitration have tended to afford a wide interpretation of the scope of the agreement.[492] In *Fiona Trust v Privalov,* Lord Hoffmann held that, unless clearly and explicitly stated otherwise:

> the construction of an arbitration clause should start from the assumption that the parties … are likely to have intended any dispute arising out of the relationship ... to be decided by the same tribunal.[493]

The intention is to respect party autonomy, as far as objectively possible. This objective approach, however, is likely to be affected by cultural attitudes towards arbitration. For example, in the context of an arbitration-friendly culture, English courts developed the 'doctrine of sufficiently close connection' to allow that tortious

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[489] Julian DM Lew, 'Arbitration Agreements: Form and Character' in Petar Sarcevic (ed*), Essays on International Commercial Arbitration* (Graham & Trotman 1989) 51, 53.

[490] Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013) 21. See the French case heard by the Cour de cassation: Civ. 2e, 7 July 1971, *JCP*, 1971, II, 16898.

[491] Henry P de Vries, 'International Commercial Arbitration: A Contractual Substitute for National Courts' (1982) 57 *Tulane Law Review* 42, 47.

[492] Julian DM Lew, 'Arbitration Agreements: Form and Character' in Petar Sarcevic (ed*), Essays on International Commercial Arbitration* (Graham & Trotman 1989) 51, 54-55; Hong-Lin Yu, *Commercial Arbitration: The Scottish and International Perspectives* (Dundee University Press 2011), 56-57.

[493] *Fiona Trust v Privalov* [2007] UKHL 40, [13],

disputes may be resolved under the authority of an arbitration agreement if the claim is sufficiently closely connected to the parent contract.[494]

Sixth, the agreement must relate to suitable subject matter. The starting point is that any private dispute should be arbitrable. This is then subject to the constraint that disputes engaging with matters of public interest may be better resolved in the public and formal setting of the national courts. Thus, arbitrability may be restricted by public policy,[495] with the extent of those restrictions dependent on how autonomy is conceived. As discussed earlier, the more social and relational conceptions of autonomy justify greater restrictions on the freedom to arbitrate.

Seventh, the agreement must include the necessary content to enable the dispute to be arbitrated. As a mechanism that allows the process of litigation to be replaced by arbitration, the agreement must establish equivalent rules of procedure, creating a framework for the arbitration process.[496] This includes: which disputes should be subject to arbitration; the arbitration seat and the *lex arbitri*; the arbitrators; the procedural rules; the substantive law; the language; the timetable; the availability of interim measures; and the arrangements for paying the costs.

Finally, the eighth core attribute is the effect of the agreement. Where it is both valid and effective, an arbitration agreement transfers the jurisdictional power to resolve the relevant disputes from the court to the arbitration tribunal. It replaces the right to litigate a dispute with an obligation to submit the relevant dispute to arbitration, to fulfil any duties established by the agreed rules of procedure, to cooperate with the

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[494] *Woolf v Collis Removal Service* [1948] 1 KB 11, 18-19

[495] L Yves Fortier, 'Arbitrability of Disputes' in Gerald Asken, Karl-Heinz Bockstiegel, Micheal J Mustill, Paolo Michele Patocchi, Anne Marle Whitesell (eds) *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC Publishing 2005) 269, 270-271.

[496] Henry P de Vries, 'International Commercial Arbitration: A Contractual Substitute for National Courts' (1982) 57 *Tulane Law Review* 42, 64.

process and, absent any flaws in that process, to respect the tribunal's decision and abide by its award.

3.3 The Law Governing Arbitration Agreements

The fundamental importance of the arbitration agreement and its justification should be reflected in the provisions of the legal framework that governs arbitration. As discussed above, the justification for arbitration lies in the parties' autonomy, which raises the question of how may the law ensure the arbitration agreement reflects the will of the parties? Although party autonomy provides its justification, arbitration is not a free-floating device for promoting individual autonomy. Rather, arbitration is designed to resolve disputes between the parties to the agreement. This raises a second question, which asks how the legal framework should be designed to ensure that the agreement enables a just and cost-effective resolution, consistent with party autonomy? This question encompasses two issues, which are whether the restrictions on party autonomy enhance the justice or cost-effectiveness of the process. Finally, as noted earlier, autonomy is not without limits. Given the state interest in ensuring disputes are justly resolved without harming society, the state may impose limits on the matters that may be arbitrated. This raises a third question, which asks what restrictions may be justifiably imposed on the parties' freedom to arbitrate a dispute and to determine the arbitration process? The issues raised by these questions highlights the necessary balance between autonomy, procedural justice and cost-effectiveness. As discussed above, this balance may be influenced by the attitude towards individual and party autonomy situated within the socio-legal context of the relevant jurisdiction. It will be addressed by comparing the approach under the SAL 2012 with the approach under the Scottish Act and the Model Law.

3.3.1 Approaches to arbitration agreements

Considering first, the Model Law. This is silent on the meaning of arbitration, which is perhaps unfortunate since it may result in otherwise unnecessary litigation.[497] Rather, the Model Law assumes that the meaning of arbitration is generally understood and deals directly with the arbitration agreement in three articles. Article 7, which 'was amended in 2006 to better conform to international contract practices',[498] provides two options. In following the NY Convention, option I defines both the nature and form of the arbitration agreement. While option II relies on the same definition of the arbitration agreement, it leaves the form unspecified and for the parties to determine.

In both options, an arbitration agreement is defined as: ‘an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not’. Under option I, the agreement may be a contractual clause or a separate agreement, but must be in writing. Regardless of how it is concluded: ‘an arbitration agreement is in writing if its content is recorded in any form’.[499] This includes: ‘electronic communication’;[500] the statements of claim and defence, provided the agreement is not denied by one of the parties;[501] and a contractual reference that incorporates an arbitration clause in any document.[502] However, this is not the case for option II, which, as noted above, requires no written formality.

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[497] Norbert Horn, 'The arbitration agreement in light of case law of the UNCITRAL Model Law (Arts 7 and 8) (2005) 8 *International Arbitration Law Review* 146.

[498] UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006* (UN 2008) 28. <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html> accessed 30 November 2017.

[499] Option I, article 7(3).

[500] Option I, article 7(4).

[501] Option I, article 7(5).

[502] Option I, article 7(6).

Both options for article 7 require that the parties mutually demonstrate an intention to submit the dispute to arbitration,[503] which must be ongoing and not withdrawn through, for example, termination or waiver.[504] This is a necessary prerequisite for the agreement to be effective, which must be applicable to the dispute presented for resolution.[505] While the agreement must, by definition, reflect a mutual commitment to arbitration, it should still be effective even where it permits one of the parties to unilaterally refer the dispute to arbitration, provided that this was the mutual intention of the parties.[506] This reflects the freedom allowed by the principle of party autonomy,[507] but remains subject to that intention being clearly expressed.

In *Jagdish Chander v Ramesh Chander*, the Supreme Court of India held that a clause stating that a dispute 'shall be referred for arbitration if the parties so determine' was not an arbitration agreement. Raveendran J explained that: 'the words used [in an arbitration agreement] should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility'.[508] The problem was the phrase 'if the parties so determine', which suggests that there was no firm agreement. Rather, arbitration would be an option only if both parties subsequently consented. The clause was interpreted as an agreement to consider the use of arbitration and not an arbitration agreement.

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[503] Bundesgerichtshof, Germany, VII ZR 105/06, 25 January 2007 <http://www.dis-arb.de/en/47/datenbanken/rspr/bgh-case-no-vii-zr-105-06-date-2007-01-25-id653> accessed 30 November 2017.

[504] *Paquito Lima Buton v Rainbow Joy Shipping Ltd Inc* [2008] HCCFA 30 (Hong Kong).

[505] See the earlier discussion of *Fiona Trust v Privalov* (n 401).

[506] *Pittalis v Sherefettin* [1986] QB 868.

[507] Unilateral clauses that commit one party to arbitration, but allow the other party to litigate may be deemed invalid as creating an inequality in the parties' right of access to justice: *CJSC Russian Telephone Company v Sony Ericsson Mobile Telecommunications Rus LLC*, Supreme Arbitration Court of the Russian Federation, 19 June 2012 <http://www.arbitrations.ru/userfiles/file/Case%20Law/Enforcement/Sony_Ericsson_Russian_Telephone_Company_Supreme_Court%20eng.pdf> accessed 30 November 2017.

[508] *Jagdish Chander v Ramesh Chander* (2007) 5 SCC 719, [8i] (India).

The agreement in *Chander* may be distinguished from those that allow *either* party the option of dispute resolution through arbitration. While the agreement in *Chander* required the contemporaneous consent of both parties, an agreement that allows one or other party to refer a dispute to arbitration is the exercise of an option to arbitrate that had been previously authorised by the mutual consent of the parties.[509] Such an option may be conditional on a time limit for referral. If the time limit passes without the option being taken up, then the consent to arbitration lapses and it can no longer be considered a valid and effective arbitration agreement.[510] However, where there is an arbitration agreement that sets a time limit for referral of a dispute, a failure to refer within the time limit does not render the agreement "inoperative".[511]

Where a clause is ambiguous as to the parties' intentions, contextual evidence from the parties' behaviour and any additional communication between them may be used to resolve the ambiguity.[512] As far as that contextual evidence reflects the intentions of the parties, this is a pragmatic approach that respects party autonomy and facilitates arbitration. It would be unfortunate if a party was able to hide behind the technicality of a poorly drafted agreement where there is good contextual evidence of the parties' intentions. This supports the mutually binding nature of the autonomous commitment to an agreement,[513] which the law should enforce regardless of technical failings where there is sufficient evidence that the parties had, in fact, made such an agreement. Ultimately, however, whether an arbitration agreement exists will depend on the precise wording used and the court's attitude to arbitration.[514]

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[509] *Grandeur Electrical Co Ltd v Cheung Kee Fung Cheung Construction Co Ltd* [2006] HKCA 305.

[510] *Thorn Security (Hong Kong) Ltd v Cheung Kee Fung Cheung Construction Co Ltd* [2004] HKCA 217.

[511] *China Merchants Heavy Industry Co Ltd v JGC Corporation* [2001] HKCA 248.

[512] *Powertech World Wide v Delvin International General Trading LLC* (2012) 1 SCC 361 (India).

[513] See the explanatory theory of the model arbitration agreement (section 3.2.5).

[514] *ICAC International Consultech v Silverman* (1991) CanLII 2868 (Quebec CA, Canada).

Although defining the meaning of an arbitration agreement, the Model Law fails to fully define what constitutes a valid agreement. It provides only the minimal guidance under article 34,[515] that an award may be set aside where a party to the agreement 'was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it'. This is presumably because the validity of contractual and other legal agreements is generally understood to require a voluntary and competent consent based on a true belief regarding the agreement and its consequences. Thus, an agreement will be void where the party has not consented,[516] where any consent has been induced by duress,[517] fraud or misrepresentation,[518] or where the party lacked the legal capacity to enter into such an agreement.[519] The failure to fully define the substantive conditions of agency required for a valid agreement is, however, unfortunate because it misses the opportunity to ensure that the rules are sufficiently clear and specifically focused on the particular nature of the arbitration agreement.

Watts, for example, recently noted in relation to the Commonwealth common law on contracts, that the 'case law on the relevant points of agency is fairly thin'.[520] Even as recently as 2014, the UK Supreme Court was required to determine that capacity was not to be determined globally, but was relative to the specific decision.[521] This was based on the approach take under the Mental Capacity Act 2005 and it is by no means certain that other jurisdictions would take the same approach.[522] Consider the question of incapacity further. The common law takes an objective approach and

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[515] See also article 36 on the Grounds for refusing recognition or enforcement.

[516] *Mariana Maritime SA v Stella Jones Inc* [2002] FCA 215 (Canada).

[517] *Barton v Armstrong* [1976] AC 104 (PC).

[518] *Fiona Trust v Privalov* [2007] UKHL 40.

[519] *Hart v O'Connor* [1985] AC 100 (PC).

[520] Peter Watts, 'Contracts made on behalf of principals with latent mental incapacity: the common law position' (2015) 74 *Cambridge Law Journal* 140, 141.

[521] *Dunhill v Burgin* [2014] UKSC 18.

[522] *Dunhill v Burgin* [2014] UKSC 18, [13].

holds that the contract is binding if the other party had no reason to believe the person lacked legal capacity.[523] Whether this is just depends on perspective. If liberal individual autonomy is relied on, then it is arguable that the law should adopt a subjective approach that voids the agreement because of incapacity regardless of whether the other person was aware of the person's incompetence. If the imperfections of human communication are acknowledged, then a more balanced approach would be justified, with the arbitration deemed as valid, but subject to additional safeguards protecting the interests of the party lacking capacity. Given the importance of the agreement, and of party autonomy, it would have been better had the Model Law set out the basic rules of validity.

Given the relatively thin definition of the arbitration agreement, with no consideration of substantive validity, the value of article 7 lies primarily in its approach to the agreement's formal validity. Here it provides the choice between imposing a requirement for the agreement to be in writing, or allowing the parties complete freedom, with no restrictions on the form of the agreement. Option I retains the evidentiary security of requiring the agreement to be in writing, but widens the scope of what constitutes a written agreement to allow for the more modern electronic means of communication. Furthermore, it no longer requires the parties to sign the agreement or formally exchange messages.[524] The 2006 version also clarifies that only the content of the agreement needs to be recorded in writing, which resolves any conflict regarding the need for the assent to also be in writing.[525]

This more liberal approach to the "in writing" requirement was applied in *AQZ v ARA*, which concerned, *inter alia*, the validity of an arbitration agreement.[526] The

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[523] *Imperial Loan Co v Stone* [1892] 1 QB 599; *Hart v O'Connor* [1985] AC 100 (PC);

[524] See Article 7(3), which sets out the formal requirements and no longer contains the requirements for signatures and exchange that were in the 1985 version of the Model Law, article 7(2).

[525] Compare *H Smal Ltd v Goldroyce Garment Ltd* [1994] HKCFI 203 (Hong Kong), with *Achilles (USA) v Plastics Dura Plastics Itee Ltd* [2006] QCCA 1523 (Quebec CA, Canada).

[526] *AQZ v ARA* [2015] SGHC 49 (Singapore).

agreement in question had been concluded orally. There was, however, adequate written record of the content of the agreement and no evidence that the lack of signatures represented any disagreement with the clause. Based on the 2006 version of article 7, the High Court of Singapore accepted the validity of an arbitration agreement recorded unilaterally and unsigned. It held that, provided the parties had concluded the agreement and the content was recorded, an oral agreement would be sufficient.[527]

Option I for article 7 therefore strikes a practical balance between certainty and flexibility. Allowing the requirement to be satisfied retrospectively through an exchange of claim and defence statements where the existence of the agreement is not in question removes a potential technical barrier that could be used to unjustly obstruct the arbitration process. This facilitation of arbitration and party autonomy is further enhanced by the recognition that the statements of claim and defence are not limited to those made during formal proceedings, but include informal statements made prior to the commencement of any proceedings.[528]

Option II is even more liberal in its approach, imposing no formal requirements. While this maximises party autonomy, it may subsequently create evidentiary issues unless the agreement is at least recorded in some form. Although the form is not specified, it would be unwise to leave an agreement undocumented. The timing and manner of documentation, however, is entirely up to the parties. Furthermore, this latter option means that the form of the agreement is simply a matter of evidence and not validity, while under option I, an agreement not in writing will be deemed invalid.

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[527] *AQZ v ARA* [2015] SGHC 49, [120].

[528] *Gay Constructions Pty Ltd v Caledonian Techmore (Building) Limited* [1994] HKCFI 171, [13] (Hong Kong).

Turning now to the Scottish Act, which immediately sets the pro-arbitration tone of the statute in its founding principles under s.1. It states:

> S 1(b) that parties should be free to agree how to resolve disputes subject only to such safeguards as are necessary in the public interest
>
> S 1(c) that the court should not intervene in an arbitration except as provided by this Act.

These founding principles provide a liberal context for the legal framework supporting the arbitration process. The freedom to agree to arbitrate, subject only to 'necessary' public interest exceptions establishes the Act's 'focus on party autonomy'.[529]

Like the Model Law, the Scottish Act does not explicitly define the meaning of arbitration, although it does state that the object of arbitration is the just and efficient resolution of a dispute between the parties.[530] Similarly, it also fails to define what constitutes a valid agreement, which presumably will be subject to the same conditions as any other legally binding agreement. The Act does, however, provide a very wide definition of a dispute that may be the subject of an arbitration agreement. Under s.2:

> "dispute" includes -
>
> (a) any refusal to accept a claim, and
>
> (b) any other difference (whether contractual or not)

This is an 'inclusive' definition, not restricted to contractual disputes and allowing the arbitration of claims even where it may be argued that 'the matters in question are ... beyond dispute'.[531] It does not, however, make a 'dispute capable of being arbitrated

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[529] Joanna Dingwall, 'International Arbitration in Scotland: A Bold New Future' (2010) 13 *International Arbitration Review* 138, 140.

[530] Scottish Act, s 1(a).

[531] Scottish Act, Explanatory Notes, para 22.

if, because of its subject-matter, it would not otherwise be capable of being arbitrated'.[532]

The intention behind the broad definition was to avoid any restrictions on what may, or may not, be considered arbitrable. The Scottish Parliament highlighted the difficulties in setting out 'clearly in statute what is and what is not arbitrable', explaining that: 'matters such as public policy are constantly evolving'.[533] It was undoubtedly wise not to put on the straight jacket of a statutory list of public policy exceptions to what may be the subject matter of an arbitration agreement. This allows the Scottish Parliament the freedom to change or add to established exceptions. It does, however, leave the decision in practice at the discretion of the judiciary, which sacrifices certainty for flexibility.

The Scottish Act provides the framework for arbitration agreements in three sections, which are supported by the SAR. Under s.4, an agreement may be made *ex ante* and included as a contractual clause. Alternatively, the parties may specifically agree to arbitrate a dispute *ex post*. S.4 also allows that the agreement may be part of the main contract or incorporated by reference to an agreement in another document.[534] This is consistent with the general international approach to arbitration and maximises party autonomy.

In line with option II of the Model Law,[535] the Scottish Act imposes no formal requirements on the agreement, which may be oral, or in writing.[536] This ensures that

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[532] Scottish Act, s 30.

[533] Scottish Parliament, *Arbitration (Scotland) Bill Policy Memorandum* (2009), para 64 <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16034.aspx> accessed 30 November 2017.

[534] Scottish Act, Explanatory Notes, para 25.

[535] Article 7.

[536] Requirements of Writing (Scotland) Act 1995, s1(1); Scottish Act, Explanatory Notes, para 26.

oral agreements are subject to the Act and not governed by the common law, which would have been 'a recipe for disaster, given the dire state of that common law'.[537] As noted previously, this maximises flexibility and party autonomy, but may create evidentiary problems where there is not at least some record of the agreement. While it would be unwise for parties not to record the agreement, the advantage of the Scottish approach is that it does not impose formalities on the parties, who are free to choose how best to maintain a record. This is, of course, subject to the caveat that, where a party may seek to enforce the award in a foreign jurisdiction, the NY Convention still requires a written agreement.[538]

The doctrine of separability is implemented by s.5 of the Scottish Act. This provides that an arbitration clause 'is to be treated as a distinct agreement', wholly separate from the main contract.[539] Consequentially, the validity of the agreement is independent of the validity of the main contract.[540] This issue was discussed in chapter two and is essentially consistent with the Model Law and generally accepted principles of ICA. It is significant because it respects party autonomy by preserving the intention to arbitrate even where the dispute relates to an invalid contract. It also has symbolic importance, since it emphasises that the agreement to arbitrate is an independent, legally binding agreement and not simply a derivative clause of a private contract.

Consistent with the Model Law and the Scottish Act, the SAL 2012 treats the arbitration agreement as wholly separate to any contract.[541] By making it clear that the validity of the arbitration agreement is independent of the validity of any parent contract, article 21 reflects the dominant approach in ICA. Furthermore, it avoids the

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[537] Hew R Dundas, 'The Arbitration (Scotland) Act 2010: Converting Revision into Reality' (2010) 76 *Arbitration* 2, 13.

[538] UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, article 2.

[539] Scottish Act, s 5(1).

[540] Scottish Act, s 5(2).

[541] SAL 2012, article 21.

problems of legal challenge and conflicting judgments that beset jurisdictions such as the United Arab Emirates, where the Federal Civil Procedures Law 1992 fails to explicitly provide for the doctrine of separability.[542]

In determining what constitutes a valid agreement, article 1(1) of the SAL 2012 defines the arbitration agreement as:

> An agreement between two or more parties to refer to arbitration all or some of the disputes that have arisen or may arise between them with respect to a particular legal relationship, whether contractual or otherwise, and whether the arbitration agreement is in the form of an arbitration clause included in the contract, or in the form of a separate arbitration agreement.

Other than specifying that there can be more than two parties to an agreement, this is effectively the same as the definition provided by the Model Law. Like both the Model Law and the Scottish Act, this definition fails to fully determine what constitutes a valid arbitration agreement. Some clarification is found in article 2, which states that the SAL 2012 'shall not apply to disputes related to personal status and to matters in respect of which no settlement is permitted'. This means that there cannot be a valid arbitration agreement to resolve disputes relating to personal status or that involve crimes against God (*hudud*) and divorce following adultery (*lian*).[543]

Further clarification is provided by article 9, which provides that arbitration agreements may be valid whether they are made in anticipation of possible disputes or as a response to a dispute that has arisen. In the former case, article 9(1) makes it clear that such agreements will not be voidable simply because of the uncertainty inherent to future disputes. This is important because, as discussed, uncertainty

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[542] Bakr AF Al-Serhan, 'The separability of arbitration agreement in the Emirati law' (2016) 32 *Arbitration International* 313.

[543] Salah Al Hejailan, 'The New Saudi Arbitration Act: A Comprehensive and Article-by Article Review' (2012) 4 *International journal of Arab Arbitration* 15, 17.

(*gharar*) is prohibited under *Sharia* law. In the latter case, the agreement will still be valid 'even if a claim in respect of that dispute had been filed before the competent court', provided it avoids *gharar* by specifying 'the issues to be covered by arbitration'. This is a significant liberalisation of the approach to arbitration, with the SAL 2012 removing any need to seek judicial approval of arbitration submission agreements.[544]

Under article 9(2), the arbitration agreement must be in writing, which under article 9(3) will be the case: 'if it is included in an instrument that was issued by the two parties to arbitration, or if it is included in certified mutual correspondence, cables, or in any other written or an electronic communication'. Furthermore, under article 9(3) an arbitration agreement may be formed by reference in the contract 'to any document which incorporates an arbitration clause'. Where an agreement is made by reference, it must be clear that the referenced arbitration clause 'is an integral part of the contract'. In requiring that the agreement be in writing, article 9(2) reflects option I of the Model Law. Article 9(3) defines when the requirement will be satisfied and is similar to the Model Law provision on which it is based, offering a flexible range of ways to ensure that an agreement is valid. However, while the Model Law allows that an agreement may be concluded orally and recorded in any form, the SAL 2012 requires a mutually issued instrument or an exchange of documents, whether or not in electronic form. This means that 'an arbitration agreement ... cannot be concluded orally'.[545]

Precluding orally concluded arbitration agreements restricts the autonomy of the parties more than either the Model Law or the Scottish Act. It is, however, consistent with the requirements of the NY Convention and balances the reduction in flexibility

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[544] Jean-Pierre Harb, Alexander G Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 *Journal of International Arbitration* 113, 128.

[545] Jean-Benoit Zegers, 'National Report for Saudi Arabia', in: Jan Paulsson (ed) (Kluwer Law International 1984, Supplement No 75 2013) *International Handbook on Commercial Arbitration* 1, 12.

by ensuring greater evidentiary certainty. Furthermore, it may be argued that this constraint is a reasonable attempt to reduce the risk of uncertainty regarding the existence or scope of an agreement, which would be consistent with the *Sharia*, given its prohibition of *gharar* However, it should be noted that, both in Arabic culture and under the *Sharia*, parties are bound by agreements, whether oral or written.[546] As Tarin observes, 'there is no specific requirement to have a written agreement to arbitrate'.[547] There is, therefore, a tension between the need to avoid uncertainty and the need to enforce oral agreements. The SAL 2012 resolves this tension in favour of avoiding uncertainty, but at the complete expense of oral agreements and party autonomy.

Article 10(1) of the SAL 2012 helpfully clarifies that an arbitration agreement will only be valid where both parties or their representatives, whether natural or legal persons, have the legal capacity to alter their rights and obligations through the terms of the agreement. Grounded in the understanding that competence is a prerequisite of autonomy, this explicitly confirms that any agreement made by an incompetent person will be invalid. The SAL 2012, however, does not define when a person would be considered incompetent, which must be determined by reference to the national law. This reflects the approach that is implicit to the Scottish Act.

3.3.2 Arbitration agreements and the court's role

A valid arbitration agreement allows the parties to resolve the dispute by the specified arbitration process. This gives effect to party autonomy and should be respected by the courts. Thus, in determining whether to stay legal proceedings and refer the dispute to arbitration, the courts tend to appeal to the importance of party autonomy

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[546] Mary B Ayad, 'Harmonisation of International Commercial Arbitration Law and *Sharia*' (2009) 6 *Macquarie Journal of Business Law* 93, 116; Shaheer Tarin, 'An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices' (2015) 26 *American Review of International Arbitration* 131, 148.

[547] Shaheer Tarin, 'An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices' (2015) 26 *American Review of International Arbitration* 131, 148.

as the justification underlying the arbitration agreement.[548] Under the Model Law, the court's obligation is set out in article 8(1):

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Thus, under article 8, where a dispute that is the subject matter of an arbitration agreement is also the subject of a court action, the court is obliged to comply with a valid request by one of the parties to refer the dispute to arbitration. To be valid, the request must be made at the time of the first substantial submission and is subject to the court's judgment that the arbitration agreement is valid and effective as determined by reference to national law and public policy. In determining these matters, as discussed in chapter two, the court is allowed some discretion, but in principle should refer the matter for arbitration where there is *prima facie* evidence of the existence of a valid and effective agreement.[549]

The issues of autonomy, agency and consent were considered earlier. Here it remains to be noted that party autonomy is limited by the state's public policy interest in ensuring procedural justice, with some subject matters not considered suitable for arbitration and so reserved for the state to resolve. Any arbitration agreement relating to such matters, which may include issues of criminal or family law, will be deemed null and void. Thus, disputes regarding whether a contract defrauds one of the parties may be reserved for determination by the courts.[550] An arbitration agreement may also be deemed null and void where it is unconscionable or manifestly unfair,

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[548] *Burlington Northern Railroad Co v Canadian National Railway Co* [1997] 1 SCR 5 (SC, Canada).

[549] Zh Stalev, 'The Arbitral Tribunal Vis-a-Vis the Arbitration Agreement' (1990) 4243 *Revue Hellenique de Droit International* 233, 242.

[550] *Agrawest &AWI v BMA* [2005] PESCTD 36 (Canada).

although standard form contracts, such as those found in consumer transactions, are not inherently unfair.[551] Beyond this, an arbitration agreement may be deemed incapable of performance because of invalid or ineffective provisions. For example, where an agreement included the appointment of a sole arbitrator who was neither impartial nor independent, then it was an invalid provision rendering the arbitration agreement ineffective.[552]

Under article 8(2), parallel arbitration proceedings may be initiated while the court is making its decision and, under article 16, the arbitration tribunal may itself rule on the existence and validity of the arbitration agreement. As discussed in chapter one, this implements the competence-competence principle and, together with article 8, establishes a framework that balances party autonomy and the intention to arbitrate against certainty and the procedural injustice of enforcing arbitration in the absence of a valid and effective agreement. Thus, while article 16 limits party autonomy by not allowing the parties the freedom to exclude the arbitration tribunal's power to determine its own jurisdiction,[553] it does provide for the opportunity to challenge a decision. Furthermore, article 16 implements the doctrine of separability, making it clear that the arbitration agreement's validity is independent of the validity of the parent contract.[554]

The Model Law allows that a party may request interim measures of protection, without the request being incompatible with an arbitration agreement.[555] Following article 1(2), a request for interim measures may be made regardless of whether the

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[551] Bundesgerischtshof, Germany III ZR 265/03, 13 January 2005 <http://www.dis-arb.de/en/47/datenbanken/rspr/bgh-case-no-iii-zr-265-03-date-2005-01-13-id305> accessed 30 November 2017.

[552] *Desbois v AC Davie Industries inc* [1990] CanlII 3619 (Quebec CA, Canada).

[553] Charles Chatterjee, 'The Reality of the Party Autonomy Rule in International Arbitration' (2003) 20 *Journal of International Arbitration* 539, 551-552.

[554] See the discussion in chapter one.

[555] Model Law, article 9.

place of arbitration is undetermined or in a foreign jurisdiction.[556] This recognises the need for national legal systems to support the process of arbitration and protects the parties' interests. Such an approach may be justified by three main reasons.[557] First, such measures may be needed before the arbitration tribunal is formed. Second, arbitration orders for interim measures may be difficult to enforce. Third, the interim measures may need to bind third parties beyond the jurisdiction of the arbitrators.

An alternative approach would have been to require that interim measures of protection should be provided for as part of the arbitration agreement. This would be more consistent with a liberal approach to autonomy, and the autonomy model of arbitration. The advantage of the approach under article 9, however, is that it acknowledges the pragmatics of arbitration where one or both parties may choose to act self-servingly and destroy evidence or assets, ignoring the obligations created by their voluntary commitment to the agreement.

Turning now to consider the Scottish Act. Under s.10(1), which applies regardless of whether the arbitration is seated in Scotland,[558] the court must suspend legal proceedings where the applicant is a party to an arbitration agreement regarding the disputed issue. This requires the courts to respect a valid arbitration agreement and so to respect the principle of party autonomy embodied by the parties' choice to submit the dispute for resolution by arbitration. This also respects the autonomy of the arbitration process by supporting, rather than undermining, the jurisdiction of the arbitration tribunal to ensure a substantively just resolution to the dispute. As discussed in chapter two,[559] the impact of s.10 does depend on how interventionist the courts choose to be regarding the validity of the arbitration agreement. Following

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[556] *Front Carriers v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 (HC, Singapore).

[557] Raymond J Werbicki, 'Arbitral Interim Measures: Fact or Fiction?' in *AAA/ICDR Handbook on International Arbitration and ADR* (2nd edn, American Arbitration Association 2010) 89, 91.

[558] Scottish Act, s 10(3).

[559] Chapter two, section 2.3.2.

the approach of the English courts, [560] which is predicated on the need to preserve a just balance of the parties' rights and interests, the Scottish courts may go beyond a *prima facie* approach and require that the agreement to arbitrate be 'virtually certain'.[561] Such an approach, although prioritising justice over autonomy, would not be inconsistent with the obligation to have regard to the founding principles under s.1.

Turning now to consider the approach under the SAL 2012. The mandatory effect of the word "shall" in Article 11(1) implements article 8 of the Model Law and is similar in effect to s.10 of the Scottish Act. Article 11(1) provides that, where 'an agreement with respect to that dispute exists' and the respondent raises the agreement as a defence, the court is disallowed from further consideration of the claim. Therefore, the Saudi courts are required to respect a valid arbitration agreement, which has the standard effect of empowering the arbitration tribunal with the primary jurisdiction for resolving the relevant dispute. Again, this adequately respects party autonomy, but is contingent on the Saudi courts implementing article 11 as intended and may require a cultural shift in the attitude of the courts to foreign arbitration, particularly under foreign governing law.[562] As noted previously, such cultural change is being encouraged by the implementation of the SAL 2012 itself coupled with the establishment of the SCCA. It is also made more likely by the reform of the Saudi judicial system, which includes the establishment of specialised commercial courts.

Under article 12, the obligation on the court to refer a dispute to arbitration, contingent on a valid arbitration agreement, extends to agreements concluded during the process of a litigation. This provision, along with article 9(1), provides flexibility and respects the autonomy of the parties who agree to resolve a dispute by arbitration regardless

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[560] Arbitration Application (No.3 of 2011) [2011] CSOH 164, [8].

[561] See Waller LJ's discussion in: *Naimi v Islamic Press Agency Inc* [2000] EWCA Civ 17.

[562] Jean-Benoit Zegers, 'National Report for Saudi Arabia', in: Jan Paulsson (ed) (Kluwer Law International 1984, Supplement No 75 2013) *International Handbook on Commercial Arbitration* 1, 20-21.

of the timing of that agreement. It is both a practical and symbolic reflection of the priority given to arbitration agreements over the jurisdiction of the national law. As such, it should help with the ongoing cultural shift mentioned in the preceding paragraph.

3.3.3 Arbitration agreements and the parties' power to shape the arbitration process

Apart from the specific provisions discussed above, the Model Law also allows the parties to determine many features of the arbitration process, while including a default procedure in case the agreement fails to make an adequate specification. This means that neither the validity nor the effectiveness of an arbitration agreement will be compromised by the failure of the parties to make explicit provision for an essential aspect of the arbitration process. Thus, in *MMTC Ltd v Sterlite Industries (India) Ltd*, the Supreme Court of India held that the validity of the agreement did not depend on whether the parties had appointed the required number of arbitrators. Furthermore, the default rules made up for any deficiencies in the provisions made by the parties.[563]

Articles 10 and 11 allow the parties to agree on the appointment of arbitrators and the composition of the tribunal, with the option of seeking the court's assistance to overcome any failure in the process, so facilitating the arbitration process.[564] Article 19 allows the parties to determine the arbitration procedure, although this is subject to the explicit provisions of the Model Law. The Model Law also allows the parties to determine the place of arbitration;[565] to vary the commencement date;[566] and to determine the language to be used in the proceedings.[567] The parties are free to restrict

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[563] *MMTC Ltd v Sterlite Industries (India) Ltd* (1996) 6 SCC 716 (India).

[564] Tatsuya Nakamura, 'Appointment of arbitrators according to UNCITRAL Model Law on International Commercial Arbitration' (2005) 8 *International Arbitration Law Review* 179.

[565] Model Law, article 20.

[566] Model Law, article 21.

[567] Model Law, article 22.

their freedom to amend or supplement statements of claim and defence.[568] Furthermore they can determine the nature of the proceedings held by the arbitration tribunal,[569] the consequences where one party defaults on the process,[570] and the role played by expert witnesses.[571]

Under Article 28, the parties are free to choose the rules of law applicable to the substance of the dispute. To reduce the possibility of misunderstanding, article 28(1) clarifies that any designation of national law refers, unless explicitly stated otherwise, to the substantive law rather than conflict of laws rules. The parties may also determine the rules for decision making where the tribunal is comprised of more than one arbitrator. Under article 29, the default is a majority decision, but this may be varied by the arbitration agreement. Although the parties have no control over the requirement that the award be in writing, signed and dated,[572] they can determine whether reasons for the award should be given by the arbitrators.[573] The parties may also determine the time-period for requesting the correction of awards and the option of requesting an additional award. They cannot, however, preclude the arbitration tribunal from correcting errors 'on its own initiative'.[574] Finally, articles 34(2)(b) and 36(1)(b) allow that national law and public policy to act as constraints on the subject matter of the arbitration agreement and any subsequent award.

The Model Law's approach to the arbitration agreement prioritises the positive aspect of autonomy, which is the liberty to self-determine. However, it provides a safety-net of default rules that apply where the parties fail to determine the issue. Similarly, it

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[568] Model Law, article 23.

[569] Model Law, article 24.

[570] Model Law, article 25.

[571] Model Law, article 26.

[572] Model Law, article 31(1) and (3)

[573] Model Law, article 31(2).

[574] Model Law, article 33.

seeks to preserve the option of arbitration by allowing the court to make interim measures without being inconsistent with the arbitration agreement. This approach facilitates the arbitration process and enhances the effectiveness of arbitration agreements. In providing a safety net of default rules, the Model Law takes a social or relationally supportive approach that facilitates the autonomous choice of the party to resolve any contractual disputes by arbitration. A liberal approach that was ambivalent to the choice between arbitration and litigation would not see it as necessary to provide the default rules. Rather, it would set out the rules for when an arbitration agreement would be considered valid and effective and then leave the parties with the full responsibility of determining the content of the agreement, accepting that a failure to provide for an essential procedural element may render the agreement inoperative.

For a state seeking to create an arbitration friendly culture, the supportive Model Law approach is preferable to the ambivalence of a liberal approach. Despite its pro-arbitration framework, the Model Law necessarily acknowledges the roles of national law and public policy. Thus, relying on a pro-arbitration culture that encourages judicial deference to arbitration,[575] it accepts the role of the courts in determining the validity of an arbitration agreement, while affording an equivalent jurisdiction to the arbitrators.[576] Furthermore, it pragmatically accepts that the state should be allowed to impose restrictions based on subject-matter arbitrability and public policy, explained as 'serious departures from fundamental notions of procedural justice'.[577] Overall then, the Model Law takes a pragmatic approach to the arbitration agreement that seeks to facilitate party autonomy by allowing the parties to determine the content and subject matter of the procedure, supported by default rules that apply to preserve the agreement should the parties fail to make the relevant determination. Party autonomy is limited by the need to ensure the integrity of the arbitration process by

[575] Norbert Horn, 'The arbitration agreement in light of case law of the UNCITRAL Model Law (Arts 7 and 8) (2005) 8 *International Arbitration Law Review* 146, 147, 149. See also chapter two.

[576] Model Law, article 16.

[577] UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006* (UN 2008) 35.

establishing a procedure that is formally just.[578] It is further limited by the recognition of state sovereignty in determining arbitrability and varying the procedural justice requirements based on public policy. It is silent, however, on the privity of the agreement and the role of third parties.

Turning now to Scots law. Section 6 of the Scottish Act provides for the law governing the arbitration agreement and allows the parties to determine the governing law through the arbitration agreement. Where, however, the parties fail to specify the law of the arbitration agreement, then it will be governed by Scots law.[579] This provides a default rule based on the presumption that, in the absence of an explicit statement, the choice of seat is the best evidence of the parties' intention. For the benefit of cost-effectiveness, this assumes the parties' will and so may not reflect their actual wills, but since the parties have failed to make the choice of law explicit they must shoulder the responsibility if the default rule does not reflect their intention. As such, it is consistent with a conception of autonomy that ties self-determination to responsibility.

Given its importance, it is perhaps surprising that arbitration agreements often fail to effectively determine the seat of arbitration.[580] Section 6, therefore, has the significant advantage of precluding any dispute arising over the choice of law, facilitating the arbitration process. This provides much greater certainty and efficiency for the parties when contrasted with the conflict of laws approach that is followed in Model Law jurisdictions, such as Ireland.[581] It should avoid the need for a court hearing to

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[578] Gerold Herrmann, 'Introductory Note on the UNCITRAL Model Law on International Commercial Arbitration' (1985) 1 *Uniform Law Review os* 285, 291-293.

[579] Scottish Act, s 6(b).

[580] Jonathan Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63 *International and Comparative Law Quarterly* 517, 518-519.

[581] Joanna Dingwall, 'International Arbitration in Scotland: A Bold New Future' (2010) 13 *International Arbitration Review* 138, 140.

determine the governing law as happens, for example, under English law.[582] The English courts ask ‘with what system of law the agreement has the closest and most real connection’, which means the applicable law depends on context and may be either that of the main contract or the law of the seat.[583]

The Scottish Act establishes a system of mandatory and default rules. The aim behind this is to balance the need to ensure a just and efficient system against the interest that the parties have in exercising their autonomy to determine for themselves the process of dispute resolution.[584] Thus, s.7 provides: ‘The Scottish Arbitration Rules set out in schedule 1 are to govern every arbitration seated in Scotland (unless, in the case of a default rule, the parties agree otherwise)’. Under this approach, the mandatory rules are those seen as necessary to ensure a just and efficient process while the default rules respect party autonomy by allowing the parties the choice of their own or the default rules.[585] The default rules also play an important role in ensuring the effectiveness of arbitration and the parties' arbitration agreement by providing a safeguard against an incomplete agreement.

Under s.8, ‘"mandatory rules", cannot be modified or disapplied’. Under s.9, default rules, however, only apply where ‘the parties have not agreed to modify or disapply that rule (or any part of it)’. Rules may be disapplied by the arbitration agreement, or

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[582] *C v D* [2007] EWCA Civ 1282; *Abuja International Hotels Ltd v Meridien SAS* [2012] EWHC 87 (Comm). In those cases the courts held that the law of the seat should apply, but in *Sonatrach Petroleum Corrp v Ferrell International Ltd* [2002] 1 All ER (Comm) 627, the court held that the law of the main contract should apply; Hew R Dundas, 'The Arbitration (Scotland) Act 2010: Converting Revision into Reality' (2010) 76 *Arbitration* 2, 12. See also: *Arsonovia Ltd v Cruz City 1 Mauritius Holdings* [2011] EWHC 3702(Comm); Hew R Dundas, 'An old friend reappears: which law governs the arbitration agreement? (2013) 79 *Arbitration* 325.

[583] *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, [32].

[584] Scottish Parliament, *Arbitration (Scotland) Bill Policy Memorandum* (2009), para 78 <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16034.aspx> accessed 30 November 2017.

[585] Hong-Lin Yu, 'A Departure From The UNCITRAL Model Law - The Arbitration (Scotland) Act 2010 And Some Related Issues' (2010) 3 *Contemporary Asia Arbitration Journal* 283, 292.

'any other means', at any point before or during the arbitration process.[586] This makes it clear that a default rule may be disapplied explicitly by an intentional agreement between the parties. A default rule may also be disapplied implicitly where the parties choose to apply a law other than Scots law, or where an inconsistency is created by 'anything done with the agreement of the parties' or by the adoption of an alternative set of arbitration rules.[587] This approach should reduce the opportunity for disputes to arise over whether a default rule has, in fact, been disapplied.

The combination of mandatory and default rules 'provide a ready made framework' to facilitate the arbitration process and strike a balance between party autonomy, procedural justice and cost effectiveness. Furthermore, by separating the rules out from the main body of the Act and including them in a single schedule, the Scottish Act fulfils its aim to make the process simpler and more accessible.[588] The list of mandatory rules is long, with the original list of 28 in the draft Bill expanded to 36 mandatory rules in the final Act.[589] The very length of the list may cause concerns regarding party autonomy. However, there was a 'conscious effort … [minimise] the number of mandatory rules' and mandatory rules are only provided where necessary 'in key areas of the process to ensure the smooth and efficient running of an arbitration'.[590] One may disagree with which rules should be mandatory or default, but the general approach is justified by the aim of respecting party autonomy while ensuring a just and effective process of arbitration. The consequence of enforcing arbitration through the legal machinery of the state provides the state with the

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[586] Scottish Act, s 9(3).

[587] Scottish Act s 9(4).

[588] Scottish Parliament, *Arbitration (Scotland) Bill Policy Memorandum* (2009), paras 78-79, 88 <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16034.aspx> accessed 30 November 2017; Roy L Martin QC, Steven P Walker, 'A New Scottish Export - Scottish International Arbitration' (2012) 18 *Columbia Journal of European Law Online* 3, 6.

[589] Hong-Lin Yu, 'A Departure From The UNCITRAL Model Law - The Arbitration (Scotland) Act 2010 And Some Related Issues' (2010) 3 *Contemporary Asia Arbitration Journal* 283, 293-294.

[590] Scottish Parliament, *Arbitration (Scotland) Bill Policy Memorandum* (2009), paras 83, 85. <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16034.aspx> accessed 30 November 2017.

mandate to address issues of public policy and justice. This is achieved through mandatory provisions, including the mandatory rules. provided these are kept to the minimum necessary to ensure a just, efficient and effective process then they are a justifiable infringement of party autonomy.[591]

Rather than consider each of the rules here, the relevant rules are considered in the appropriate chapter. For example, in chapter two it was argued that party autonomy would have been better served by allowing the parties to opt out of mandatory rule 19, which provides for the principle of competence-competence. Although a similar criticism may be levelled at other mandatory rules, the overall balance of mandatory and discretionary rules provides a reasonable payoff between party autonomy and the need to ensure an effective and just process of arbitration. This is reflected in the lack of Scottish cases arising out of the arbitration agreement.

Turning now to consider the approach under the SAL 2012. In addition to providing, albeit incompletely, for the validity of the arbitration agreement and for its effect, the SAL 2012 also provides for its content. Although less clearly organised and presented than in the Scottish Act, the SAL 2012, like the Model Law, sets out a number of mandatory and default procedural rules.[592] As with the Model Law and the Scottish Act, the aim is to provide a framework that facilitates party autonomy while ensuring that the intention of the parties to arbitrate a dispute is effected through a just and efficient process. For example, under article 13, the parties are free to choose any number of arbitrators provided it is an odd number, which facilitates majority decision-making and avoids a deadlock.

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[591] Vladimir Pavic, 'Bribery and International Commercial Arbitration - the Role of Mandatory Rules and Public Policy' (2012) 45 *Victoria University of Wellington Law Review* 661, 669.

[592] Jean-Pierre Harb, Alexander G Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 *Journal of International Arbitration* 113, 118-119.

Article 14 imposes the additional restriction that at least one of the arbitrators has a university degree in *Sharia* or legal sciences. This restriction goes beyond the provisions of the Model Law and the Scottish Act, which leave the qualifications of the arbitrators in the hands of the parties. Again, this limits party autonomy, but may be justified by the need to ensure that the tribunal includes an arbitrator who understands Saudi law and due process. It is, however, debatable whether this justification is sufficient, and it may be argued that such a requirement will tend to impose a juridical character on the proceedings. This may narrow the distinction between arbitration and litigation, but is not necessarily detrimental providing it enhances procedural justice without unduly eroding party autonomy or cost-effectiveness.[593] Apart from this, the arbitrators must be legally competent and of good character, but there is no restriction on gender, which means that the parties may choose female arbitrators.

Under article 25, the parties are also free to 'agree on the procedure to be followed by the arbitral tribunal'. Thus, they can choose to apply a set of arbitration rules regardless of whether they originate inside Saudi. This power is a 'key feature of arbitration',[594] since it respects party autonomy by allowing the parties to determine many of that features that will affect the length, formality and costs of the process. The power is, however, subject to the caveat that those rules must be *Sharia* compliant. For example, it would not be possible to apply a rule that allowed the arbitrators to award interest, since this would be forbidden as *riba* under *Sharia*. This imposes a restriction on party autonomy not found in either the Model Law or the Scottish Act, but it is necessary under Saudi's formal commitment to Islam. Such a restriction, however, may be considered unacceptable by a non-Muslim and may deter non-Muslim businesses from agreeing to arbitrate in Saudi.

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[593] Leon Trakman and Hugh Montgomery, 'The "Judicialization" of International Commercial Arbitration: Pitfall or Virtue?' (2017) 30 *Leiden Journal of International Law* 405, 408-409, 423.

[594] Salah Al Hejailan, 'The New Saudi Arbitration Act: A Comprehensive and Article-by Article Review' (2012) 4 *International journal of Arab Arbitration* 15, 31.

Under article 28, the parties are free to determine the arbitration forum, which need not be situated within Saudi. This liberalisation of the law[595] importantly allows the parties the freedom to arbitrate under the SAL 2012 regardless of location,[596] which respects their autonomy and reduces the possibility of inconsistencies rendering the agreement invalid. Where the arbitration is conducted in Saudi, however, there is no freedom to choose the law applicable to the proceedings. For all such arbitrations, article 2 requires compulsory application of the SAL 2012 'to any arbitration, irrespective of the nature of the legal relationship forming the subject of dispute'.

The parties are free, under article 29, to determine the language of the proceedings, with Arabic being the default should the parties fail to specify otherwise. Furthermore, consistent with the Model Law approach, under article 38, the parties may choose the law applicable to the substantive dispute, with a default authority invested in the arbitral tribunal should they fail to indicate the law. Unlike the Model Law, however, but again consistent with Saudi's commitment to Islam, any such applicable law must not be inconsistent with *Sharia*, or any other public policy.

From the perspective of party autonomy, the SAL 2012 offers a vastly improved legal framework compared to the SAL 1983. It 'represents a significant liberalization of the requirements for a valid arbitration agreement',[597] and the parties are given far greater power to 'tailor their arbitration procedure' to suit their needs.[598] Despite the more liberal approach, arbitration in Saudi remains subject to *Sharia*, which impacts on party autonomy. While the parties are free to choose the law applicable to resolving the dispute as well as the institutional rules governing the arbitral process, the chosen

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[595] Saud Al-Ammari, A Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30 *Arbitration International* 387, 394.

[596] Article 2; Salah Al Hejailan, 'The New Saudi Arbitration Act: A Comprehensive and Article-by Article Review' (2012) 4 *International journal of Arab Arbitration* 15, 32.

[597] Jean-Pierre Harb, Alexander G Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 *Journal of International Arbitration* 113, 121.

[598] Jean-Benoit Zegers, 'National Report for Saudi Arabia', in: Jan Paulsson (ed) (Kluwer Law International 1984, Supplement No 75 2013) *International Handbook on Commercial Arbitration* 1.

law and institutional rules must be consistent with *Sharia*.[599] For instance, where the rules allow the arbitrators the discretion to award interest, this power is superseded by the prohibition of *riba* under *Sharia* and any attempt by the arbitrators to award interest will be invalid. The same may apply in relation to speculative damages such as those for loss of profit, which are prohibited as *gharar* under *Sharia*.[600]

Much will depend on how the SAL 2012 is implemented in practice, and here cultural traditions may still be influential. For example, there is nothing in the SAL 2012 that restricts the appointment of female arbitrators. In 2013, Raffa noted that: 'there are female judges in almost every Muslim country except in Saudi Arabia'.[601] This reflects that, at least as far as gender equality is concerned, Saudi is a "conservative" Islamic country that significantly restricts female autonomy.[602] The lack of female judges suggests a recalcitrance that may, in practice, restrict party autonomy by making it difficult to appoint female arbitrators even if they are permissible in principle. It appears, however, that the culture is changing. Saudi has recently permitted women to practice as lawyers, with the first female lawyer appearing in court in 2013 and the first female law firm opening in 2014.[603] Furthermore, women are now also studying and graduating from arbitration courses run in Saudi,[604] and it was reported that, in May 2016, the first female arbitrator was appointed to a tribunal

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[599] Jean-Pierre Harb, Alexander G Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 *Journal of International Arbitration* 113, 114-115.

[600] Saud Al-Ammari, A Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30 *Arbitration International* 387, 406-407.

[601] Mohamed Raffa, 'Arbitration, Woman Arbitrators and Sharia' (2013) Working Research Paper, 5 <http://works.bepress.com/mohamedraffa/1/> accessed 30 November 2017.

[602] Cindy G Buys, Stephanie Macuiba, 'Is reform a reality for women in Saudi Arabia' (2012) 17(4) *The Catalyst* <https://www.isba.org/committees/women/newsletter/2012/06/isreformarealityforwomeninsaudiara> accessed 30 November 2017.

[603] Fouzia Khan, 'First female law firm opened in Jeddah (Online, 03 January 2014) *Arab News* <http://www.arabnews.com/news/502791> accessed 30 November 2017.

[604] Fouzia Khan, '37 women complete arbitration course' (Online, 31 May 2013) *Arab News* <http://www.arabnews.com/news/453495> accessed 30 November 2017.

without objection from an administrative court of appeal exercising its power under article 15(2).[605]

3.3.4 SAL 2012 – room for improvement

The general approach to the arbitration agreement under the SAL 2012, which broadly follows that of the Model Law, is essentially consistent with the explanatory theory of the concept. It provides a supportive legal framework and allows the parties to remain in control of the arbitration process. The main constraint is the need for *Sharia* compliance. From a liberal perspective, this may be considered an unwelcome restriction. From the perspective of Islamic autonomy, it is necessary, expected and justified by Saudi's commitment to Islam. The SAL 2012 achieves a reasonable balance between a respect for autonomy in a liberal sense and the obligation of Islamic autonomy to follow the *Sharia*.

Although the SAL 2012 adequately reflects the theory underlying the concept of an arbitration agreement, there are aspects relating to the core attributes of the concept that could be improved. While it is helpful that the SAL 2012 makes explicit that there can be more than two parties, like the Model law and the Scottish Act,[606] it is silent on the issue of privity. This means that one must look beyond the SAL 2012 to determine whether third parties are engaged by the arbitration agreement. This might have been left for the courts to determine by reference to the general law of privity in contract, relying on 'grounds such as apparent agency, veil-piercing, alter ego, and estoppel'.[607] Given that the arbitration agreement is distinct from the main contract, and serves a very different purpose to main commercial contracts, it may, however,

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[605] Mulhim Hamad Almulhim, 'The First Female Arbitrator in Saudi Arabia' (Online, 29 August 2016) *Kluwer Arbitration Blog* <http://kluwerarbitrationblog.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/> accessed 30 November 2017.

[606] In Scotland, s 9 of the Contract (Third Party Rights) (Scotland) Act 2017 will deal with third parties to an arbitration agreement when it comes into force.

[607] William W Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' in Permanent Court of Arbitration (ed) *Multiple Parties in International Arbitration* (Oxford University Press 2009) 3, 5, 6.

be argued that a different approach should apply.[608] In this regard, then, it is useful that the issue has now been dealt with by article 13 of the IRSAL 2017. Article 13 provides that the tribunal may allow a third party to intervene or join the arbitration proceedings, with joinder contingent on the agreement of all parties, including the third party. This approach has the advantage of clarity and appears to balance the interests of the main parties with the third party, thus appropriately respecting individual and party autonomy. It does, however, allow the tribunal the discretion to act contrarily to the parties wishes, either by permitting third party intervention or by refusing to allow the third party's joinder. Furthermore, it imposes no justice-based restrictions on the tribunal's discretion, nor does it require the tribunal to give reasons for its decision or provide for the power to challenge the decision before a court. Finally, although the Board of Grievances has previously held that an arbitration agreement is binding on legal successors,[609] article 13 fails to deal explicitly with legal succession.

Beyond the issue of privity, the main restriction under article 10 is that government bodies are not competent to enter into an arbitration agreement unless authorised by legislation or by the consent of the President of the Council of Ministers. This is an understandable restriction given the 'experience of the ARAMCO arbitration'.[610] While this represents a limitation of party autonomy, since it relates only to government bodies it is a legitimate restriction emanating from the government's authority as an autonomous entity. Such a restriction reflects the jurisdictional elements of the SAL 2012 and consequently has the advantage of alerting foreign parties to the policy.

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[608] Daniel Busse, 'Privity to an arbitration agreement' (2005) 8 *International Arbitration Review* 95.

[609] Case no 269/3/J, (1988 (1409H)), Board of Grievances as cited in: Majed Alrasheed, Judge Mostafa Abdel-Ghaffar, 'Saudi Strides' (11 April 2017) *Global Arbitration Review* <www.globalarbitrationreview.com> accessed 20 August 2018.

[610] Jean-Pierre Harb, Alexander G Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 *Journal of International Arbitration* 113, 122.

Regarding the form of the agreement, the SAL 2012 is too restrictive in precluding agreements that are concluded orally. Although it is more restrictive than the approach to proof under both the SAL 1983 and Islamic law more generally,[611] the requirement for writing is reasonable, given that it provides evidentiary certainty and ensures consistency with the NY Convention. This, however, could have been achieved with an unmodified implementation of option I of the Model Law, which allows agreements to be concluded orally provided they are then recorded. The following hypothetical situation is a good example of a situation that may arise in practice where it may be useful to recognise oral agreements:

> A disabled supertanker is heading for the rocks. A salvage tug appears and its captain radios the captain of the supertanker offering to take the tanker in tow if the tanker captain accepts Lloyd's Rules on Salvage which contain an agreement that any dispute will be resolved using arbitration. If the tanker captain replies orally over the radio that he or she accepts Lloyd's Rules that is then an agreement to arbitrate any subsequent dispute about the salvage.[612]

While the SAL 2012 at least requires the parties to be legally competent, it would have been helpful had it gone beyond this and set out the requirements for a valid agreement more explicitly. Serving both the interests of autonomy and efficiency, this again would have allowed the requirements to be specifically tailored to the needs of arbitration rather than relying on the general national law. In this regard, it should be amended to include a more complete and explicit definition of the arbitration agreement explaining the need for the parties to be competent and for their consent to be given freely and with sufficient understanding of the agreement and its effect.

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[611] Mohammed I Aleisa, 'A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?' (PhD thesis, University of Essex 2016), 44.

[612] Scottish Parliament, *Arbitration (Scotland) Bill Policy Memorandum* (2009), para 73 <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16034.aspx> accessed 30 November 2017.

By providing for mandatory and default rules consistently with the approach of Model Law, the SAL 2012 provides a reasonable safety net of provisions that facilitate the effectiveness of the arbitration agreement. It also makes explicit that there are limits to what subject matters are capable of arbitration. Given, however, that the SAL 2012 includes international arbitration, with the possibility of involving non-Muslim parties, it would have been helpful to include a more explicit and detailed explanation of non-arbitrable subject matter than is currently provided by article 2.

Finally, the SAL 2012 creates a reasonably strong framework to facilitate the arbitration agreement in providing an alternative process to litigation. The specifics will be considered in subsequent chapters. For now, it is sufficient to note that, excepting the additional restriction of *Sharia* compliance, the framework balances party autonomy against the need for a just and efficient process in a way that is consistent with the Model Law.[613] The essential content of the agreement is adequately provided for by the SAL 2012. There is, however, much to be said for the approach taken by the Scottish Act. Providing a complete set of procedural rules as a discrete part of the Act both creates a comprehensive safety net and allows the parties additional choices for how to determine the arbitration process. Furthermore, the clarity of explicitly labelling rules as mandatory or default is also useful. It would have been preferable had the SAL 2012 taken a similar approach.

3.4 Conclusion

This chapter focused on the concept of an arbitration agreement, including its justifications, effect and limits. It began with a theoretical analysis, explaining the distinction between autonomy from a liberal western perspective and autonomy from the perspective of a Muslim. The conclusion from this was that, while the essential concept of an arbitration agreement is consistent, differing conceptions of autonomy may affect the expression of the core attributes of the concept. Specifically, the

[613] Ahmed A Altawyan, 'The Arbitral Proceedings Under the New Saudi Arbitration Law: A Comparison with International Rules' (2017) 12 *Journal of Strategic and International Studies* 113.

commitment to *Sharia* in Islam, means that any arbitration agreement with a Muslim party must be consistent with *Sharia*, which provides an additional limit to the scope of the agreement.

In the second half of the chapter, the law in practice was examined. The Model Law and Scots law approaches were explicated and used as comparators to assess the approach taken under the SAL 2012. This comparative analysis allowed the identification of those aspects that fell short of the requirements of the theoretical model. While the approach under the SAL 2012 is wholly consistent with the underlying explanatory theory of the concept of an arbitration agreement, it could be improved, particularly with regard to the first, fourth and fifth subsidiary hypotheses, by dealing explicitly, or in more detail, with issues of privity, validity, the limits on arbitrability and the rules of procedure, whether default or mandatory. Furthermore, to improve consistency with the first and second subsidiary hypotheses, orally concluded agreements should be permitted, provided they are recorded for evidentiary purposes.

In conclusion, then, the SAL 2012 provides a good framework for arbitration agreements and vastly improves on the previous law. By no longer requiring judicial approval as a condition of validity of the arbitration agreement, the SAL 2012 is consistent with the first subsidiary hypothesis. Regarding the main hypothesis and the balance between the three core principles of autonomy, justice and cost-effectiveness, however, there is still room for improvement. The failure to fully define a valid arbitration agreement limits the clarity and predictability of the law, increasing the risk of legal challenge. Contrary to the second subsidiary hypothesis, this would risk undermining the parties' autonomous decision to rely on arbitration and, contrary to the fifth subsidiary hypothesis, would be more expensive and less efficient. The balance achieved by the SAL 2012 will again be considered in chapter four in the context of the regulations governing the arbitration tribunal and proceedings.

Chapter Four: Examination of the Core Principles in the Context of The Arbitration Tribunal and Proceedings

4.1 Introduction

In chapter three, it was argued that arbitration agreements are justified by the parties' right to autonomy expressed through their consent to the agreement. Through the agreement, the parties opt-out of litigation and vest jurisdictional authority in the chosen arbitrators. This allows the parties to avoid unfamiliar foreign legal systems and instead to shape the process of dispute resolution to meet their own, mutually agreed, needs. This flexibility makes arbitration a commercially attractive alternative to litigation. Unbridled flexibility, however, may create or reinforce inequalities between the parties. This raises the question of how the flexibility required by a respect for party autonomy is balanced against the demands of procedural justice, given the power afforded the arbitrators by virtue of the arbitration agreement and backed by the support of the national legal system.

When power is exercised without the constraints imposed by justice, it risks being arbitrary, reflecting rule by domination rather than a more legitimate form of governance.[614] Justice, particularly in the procedural sense, is necessary to legitimise the state's use of power. [615] Law, as 'an instrument of government',[616] should also be an instrument of justice. Indeed, justice provides the foundations for the rule of law.[617]

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[614] John Locke, *Two Treatises of Government* (1690) II, XI, para 136, digitised edition provided by the Project Gutenberg (2010) <http://www.gutenberg.org/files/7370/7370-h/7370-h.htm> accessed 23 July 2018; TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2001), 31-32; Frank Lovett, 'What counts as arbitrary power?' (2012) 5 *Journal of Political Power* 137; J Skelly Wright, 'Beyond Discretionary Justice' (1972) 81 *Yale Law Journal* 575, 588.

[615] St Augustin, 'How Like Kingdoms Without Justice are to Robberies' in Philip Schaff (ed), JF Shaw (trans), Marcus Dods (trans), *City of God and Christian Doctrine, A Select Library of the Nicene and Post-Nicene Fathers of the Christian Church,* Volume II (The Christian Literature Company 1887), 66.

[616] Martin Loughlin, *Sword &Scales* (Hart Publishing 2000), 9.

[617] Martin Loughlin, *Sword &Scales* (Hart Publishing 2000), 69.

As Aristotle explained: 'justice exists only between men … governed by law; and law exists for men between whom there is injustice'.[618] Where disputes are resolved through litigation then the rule of law demands a just resolution mechanism. Where disputes are resolved through arbitration as a private alternative to litigation, the question is what this means for justice and the rule of law. In this chapter, that question will be addressed in context of the arbitration tribunal and the arbitration process. The chapter begins with a theoretical analysis of justice and arbitration, which is then applied to the comparative analysis of the SAL 2012.

4.2 Justice and Arbitration

4.2.1 Arbitration

Arbitration is a system that supports a process designed to resolve a dispute between two or more parties. It provides a less formal and more flexible alternative to litigation. While a judge is a public official exercising a judicial authority that comes directly from the state, the arbitrator's authority to adjudicate arises from the parties' consent to an agreement to arbitrate and is vested in private citizens who are directly or indirectly chosen by the parties. The system and process of arbitration allow the arbitrator to resolve the dispute by making a final and legally binding award that is *res judicata*.[619]

In chapter two, four theoretical models of arbitration were briefly explored. Based on that analysis, it was suggested that, while the ideal is a wholly autonomous system, arbitration in practice is best seen as a hybrid system based on a contractual agreement between the parties, but necessarily enabled and facilitated by national legal systems

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[618] Aristotle, *Nicomachean Ethics* (written 350 BCE, WD Ross (tr)), Book V, Ch 6,

available at: <http://classics.mit.edu/Aristotle/nicomachaen.html>, accessed 30 November 2017.

[619] This description of arbitration is based on: Wesley A Sturges, 'Arbitration - What is it?' (1960) 35 *New York University Law Review* 1031; Jean-Francois Poudret, Sebastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007), 3; Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012), 1-2.

that serve to both legitimise the process of arbitration and enforce the valid awards made by the arbitrators. As a hybrid system, arbitration must maintain a three-way balance between cost-effectiveness, justice and party autonomy.[620]

4.2.2 Arbitration as an alternative to litigation

The purpose of arbitration is to provide a flexible alternative to litigation for effectively resolving disputes, which requires a solution that is acceptable to both parties. This means that both the system and the process must respect party autonomy by providing the flexibility necessary to allow the parties to tailor the process to meet their particular needs. The process must also be sufficiently legitimate for both parties to willingly accept the final award, regardless of whether it is in their favour. The requirement for legitimacy derives from the parties' need to be treated with dignity as equal moral agents, reflecting a desire to be treated justly.[621] Indeed, for Rawls: 'Justice is the first virtue of social institutions ... Each person possesses an inviolability founded on justice'.[622]

Rawls' position is based on a modified social contract view of society, with the legitimacy of the state and its institutions dependent on the hypothetical consent of its members. His conception of justice as fairness reflects the idealised social arrangements to which the members of a 'well-ordered society' would, or rationally should,[623] be willing to agree if their own place within that ordered society were concealed behind a veil of ignorance. Although engaging with both formal and substantive justice, Rawls' primary concern is with substantive justice, focusing on

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[620] See chapter one, text at n 184.

[621] See the discussion in: Rebecca Hollander-Blumoff, Tom R Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' (2011) *Journal of Dispute Resolution* 1.

[622] John Rawls, *A Theory of Justice: Revised Edition* (The Belknap Press 1999), 3.

[623] John Rawls, *Justice as Fairness: A Restatement* (The Belknap Press 2001), 9.

the distributive role of justice in 'assigning basic rights and duties and determining the division of advantages'.[624]

If substantive justice were the sole concern, there would be little demand for arbitration as an alternative to litigation. Arbitration, however, provides a dispute resolution mechanism that is more accessible and flexible than litigation. The emphasis on flexibility and party autonomy allows arbitration to better meet the needs of the parties. In a 2013 international survey, 73% of respondents strongly agreed that arbitration was well suited to their needs.[625] When asked to rank seven specified benefits of arbitration as reasons for preferring arbitration to other dispute resolution mechanisms, 28% of respondents ranked neutrality of the arbitrators as the most important feature, with a further 15% placing it second. Although the expertise of the arbitrator was overall ranked ahead of neutrality, it was placed first less frequently (19%).[626] Both issues concern justice. While the expertise of the decision-maker is concerned with the substantive justice of a "correct" decision, the neutrality of the arbitrator is an issue of natural and procedural justice. Procedural flexibility and confidentiality were ranked in 5th and 3rd places respectively, with speed and cost ranked as the least important. This ranking suggests that, for the parties, a just process and outcome are the most important characteristics of a desirable mechanism for dispute resolution.

Further to the parties' interest in justice, the state also has an interest in ensuring that arbitration is just. This derives from the state's role in enabling and facilitating arbitration as a private alternative to the public process of dispute resolution available through the courts. Specifically, if the state is to enforce an arbitration award, then it

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[624] John Rawls, *A Theory of Justice: Revised Edition* (The Belknap Press 1999), 113

[625] School of International Arbitration Queen Mary University of London, *Corporate choices in International Arbitration: Industry perspectives* (2013), 1, 8 <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf> accessed 30 November 2017.

[626] School of International Arbitration Queen Mary University of London, *Corporate choices in International Arbitration: Industry perspectives* (2013), 8 <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf> accessed 30 November 2017.

must be satisfied with the legitimacy of arbitration as a process capable of ensuring the just resolution of private disputes.

Although many of the advantages of arbitration result from the flexibility, privacy and simplicity of the process, these features must be balanced against the need for procedural justice. As Haydock notes: '[a]rbitration provides a different forum, but does not restrict the rights and remedies available to a party'.[627] Therefore, as an alternative to litigation, arbitration should be built on the twin pillars of autonomy and procedural justice. While arbitration must provide the flexibility to meet the varied pragmatic needs of the parties, a system that failed to provide a just process would lose credibility and be considered illegitimate.

4.2.3 Justice

While difficult to define concisely, the basic idea of justice concerns the expectation of fair treatment and 'what people are due'.[628] This, however, simply begs the question of how to determine what is just. There are several end-points that may be used as ways to determine and measure justice. These include: equality, desert, reciprocity and need,[629] although this list could be extended to include measures such as status, entitlement, capacity to benefit. Most of these measures relate specifically to substantive justice and in the context of arbitration, they are most relevant to the fairness of the final award rather than to the process that leads up to the award. Here a distinction should be drawn between justice as equality and the other measures.

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[627] Roger S Haydock, 'Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and for the Future' (2000) 74 *William Mitchell Law Review* 745, 760-761.

[628] David Schmidtz, *Elements of Justice* (Cambridge University Press 2006), 7.

[629] David Schmidtz, *Elements of Justice* (Cambridge University Press 2006), 13-14.

Unlike the measures of substantive justice, such as need or desert, equality is a concept empty of substance.[630] It does not tell us how to treat someone, only that people should be treated equally, which is to treat them the same unless there is good reason to treat them differently. This fulfils the logical requirement of universalisability, which demands that the judgment in a particular case should be universally applied to all identical cases.[631] It reflects the Aristotelian principle that like should be treated alike and unalike should be treated differently.[632]

The Aristotelian principle concerns the way in which rules should be applied rather than their content.[633] As such, it is an example of formal justice. In discussing what he terms 'the inner morality of law', Fuller identifies eight principles of formal justice. The first of these, which broadly reflects Aristotle's principle, is that there must be generally applicable rules rather than *ad hoc* judgments. The other principles are that the rules should: be public; be prospective; be accessible; be consistent; require practically achievable conduct; be relatively stable; be applied in a way that is congruent with the published rules.[634] These principles provide a framework for the substantive rules that respects the dignity of autonomous agency and so may be described as formally just and substantively important.[635] They define the boundaries, and hence prescribe the *form*, of what a natural lawyer would deem law and what a positivist would define as good law.

In contrast to formal justice, procedural justice relates specifically to the rules that determine the adjudicative proceedings. Procedural justice, which may be as

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[630] Peter Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537.

[631] RM Hare, *Moral Thinking: Its Levels, Method and Point* (Clarendon Press 1981), 177.

[632] Aristotle, *Nicomachean Ethics*, written 350 BCE (WD Ross transl.), Book V, Ch 3. Available at: <http://classics.mit.edu/Aristotle/nicomachaen.html>, accessed 30 November 2017.

[633] Daniel Sullivan, 'Rules, Fairness and Formal Justice' (1975) 85 *Ethics* 322, 327.

[634] Lon L Fuller, *The Morality of Law* (Yale University Press 1969), 39.

[635] Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' (2011) 50 *Nomos* 3, 15.

important to the parties as the substantive justice of the arbitral award,[636] is concerned with whether the procedures treat the parties fairly and so enable a decision that is both formally and substantively just. Minimally, it requires: consistency; validity of the procedures allowing a high-quality decision accurately based on the facts; correctability, which is the opportunity to complain of procedurally unfair treatment; control within the process; impartiality; and ethicality as a respect for the rights of the parties.[637] This list could be expanded to include concerns over cost and the length of time taken to resolve a dispute. While these latter factors may not be prime concerns, it would nevertheless be unjust to the parties if their expenses and the duration of the adjudication process were disproportionate to the value of the award.[638]

Closely related to procedural justice is the common law principle of natural justice, which may be applied to ensure that statutory obligations are procedurally just.[639] As Solum explains: 'procedural justice is deeply entwined with the old and powerful idea that a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms'.[640] Natural justice, which has been judicially equated to 'common fairness',[641] or fairness 'writ large and juridically',[642] reflects the belief that justice is an essential part of all 'well-ordered human societies' and is 'naturally good for humans ... [because] it is part …

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[636] Toni Makkai, John Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20 *Law and Human Behavior* 83.

[637] Toni Makkai, John Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20 *Law and Human Behavior* 83, 84.

[638] Lawrence B Solum, 'Procedural Justice' (2004) University of San Diego Public Law and Legal Theory Research Paper Series, Paper 2, 3 <http://digital.sandiego.edu/lwps_public/art2> accessed 30 November 2017.

[639] GDS Taylor, 'Natural Justice - The Modern Synthesis' (1975) 1 *Monash University Law Review* 259, 281.

[640] Lawrence B Solum, 'Procedural Justice' (2004) University of San Diego Public Law and Legal Theory Research Paper Series, Paper 2, 1 <http://digital.sandiego.edu/lwps_public/art2> accessed 30 November 2017.

[641] *R v Aston University Senate, ex parte Roffey* [1969] 2 QB 538, 554 per Donaldson J.

[642] *Furnell v Whangarei High Schools Board* [1973] AC 660, 679 per Lord Morris.

of human flourishing'.[643] In other words, natural justice is an essential element of what it means to be human in the context of a social existence and its demands may be rationally determined from the facts of human social existence. While the idea of natural justice may be criticised for making an illegitimate move from fact to value, or for concealing ideological bias, it is unnecessary to here defend the philosophical basis for the concept.[644] This is for three reasons: first, it would be an unhelpful detour from the main focus of the chapter; second, space precludes such a discussion; and third, the use of the concept by judges in deciding cases imbues the concept with factual substance, creating a term of art somewhat distanced from its natural law origins.[645]

Speaking extra-judicially, Lord Neuberger explained the relevance of natural justice by stating that, at least in England, a foreign arbitral award will not be enforced if the principles of natural justice have been violated.[646] These principles are: '*nemo index in causa sua* (nobody should be a judge in his own cause) and *audi alterem partem* (both parties have the right to be heard, and in each other's presence)'.[647] There is ample authority for their relevance to arbitration in English law. In *Cukurova Holdings AS v Sonera Holding BV*, for example, the Privy Council was asked to consider whether an arbitration award should not be enforced because of an alleged breach of natural justice.[648] While there had not actually been a breach of natural justice, there was no question of its relevance, including the principle *audi alterem*

[643] Lawrence B Solum, 'Natural Justice' (2006) 51 *American Journal of Jurisprudence* 65.

[644] See further: Lawrence B Solum, 'Natural Justice' (2006) 51 *American Journal of Jurisprudence* 65.

[645] Frederick F Schauer, 'English Natural Justice and American Due Process: an analytical Comparison' (1976) 18 *William and Mary Law Review* 47, 48-49.

[646] Lord Neuberger, 'Arbitration and the Rule of Law' (Speech to the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 10 March 2015), para 13.

[647] Lord Neuberger, 'Arbitration and the Rule of Law' (Speech to the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 10 March 2015), para 26.

[648] *Cukurova Holdings AS v Sonera Holding BV* [2014 UKPC 14; [2014] 1 CLC 643.

partem,[649] which required the equal opportunity to be heard and imposed a general duty on arbitrators to give reasons for their decision.[650]

In *Adams v Cape*, the English Court of Appeal was asked to consider Scott J's refusal to enforce a United States (US) judgment because it was contrary to natural justice.[651] Slade LJ explained that any alleged breach of natural justice should be determined according to the 'fundamental principles of justice and not ... the letter of the rules ...designed to give effect to those principles'.[652] Relying on *Jacobson v Frachon*,[653] Slade LJ further explained that the principles of natural justice are largely, but not wholly, comprised of the due process requirements that the party be given both adequate notice and the opportunity to attend the hearing. Finally, the principle of natural justice allowed the court to respond to a 'procedural defect' only if it was sufficient 'to constitute a breach of … substantial justice'.[654]

The importance of this connection to substantive justice, is that a mere breach of procedure will be insufficient to support a refusal to enforce a foreign judgment. Rather, the procedural irregularity must be sufficiently serious to cause a clear substantive injustice.[655] Here it may be tempting to limit judgments of substantive injustice to the actual decision and award. It is, however, also applicable to significant breaches of procedure, sufficient to amount to a procedural injustice, regardless of the substantive justice of the decision or award. A failure to apply the required procedural rules is to treat unjustly one, or both, of the parties. The formal rules of procedure create a moral (and legal) obligation on the court or tribunal to apply those

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[649] See also: *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647; *Irvani v Irvani* [2000] CLC 477.

[650] *Cukurova Holdings AS v Sonera Holding BV* [2014 UKPC 14; [2014] 1 CLC 643, [30-35].

[651] *Adams v Cape* [1990] 2 WLR 657; [1990] Ch 433.

[652] *Adams v Cape* [1990] 2 WLR 657; [1990] Ch 433, 559.

[653] *Jacobson v Frachon* (1928) 138 LT 386.

[654] *Adams v Cape* [1990] 2 WLR 657; [1990] Ch 433, 564.

[655] *Adams v Cape* [1990] 2 WLR 657; [1990] Ch 433, 568.

rules in all cases and equally to both parties. Thus, a failure to fairly apply a rule is a breach of that obligation and a substantive injustice,[656] distinct from, but related to, the final decision and award.[657]

To summarise, because of its quasi-judicial nature,[658] arbitration is treated by the courts as subject to the principles of natural justice, or the related concept of due process.[659] The nature of the arbitrator's power,[660] at the very least, requires that both parties are given a fair opportunity to present their case and that the arbitrator(s) should be impartial,[661] having no personal interest in the outcome. As the Court of Appeal stated in *Locobail v Bayfield Properties*: 'In determination of their rights and liabilities ... everyone is entitled to a fair hearing by an impartial tribunal'.[662] It is arguable, however, that a breach of natural justice is actionable only where a procedural defect is sufficient to constitute a substantive injustice such that the award must be considered unfair.

4.2.4 Arbitration, autonomy and procedural justice

Given that the authority for arbitration derives from party autonomy while judicial authority comes from the state, it is reasonable to suggest that justice would allow, and may require, arbitration procedural rules that are different to those used to ensure

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[656] *Lorand Shipping Ltd v Davof Trading (Africa) BV* [2014] EWHC 3521 (Comm), [30] per Eder J.

[657] Daniel Sullivan, 'Rules, Fairness and Formal Justice' (1975) 85 *Ethics* 322.

[658] *Ridge v Baldwin* [1963] 2 WLR 935; [1964] AC 40, 72 per Lord Reid.

[659] Due process is a constitutionally protected right in the US: see, Frederick F Schauer, 'English Natural Justice and American Due Process: an analytical Comparison' (1976) 18 *William and Mary Law Review* 47

[660] *Ridge v Baldwin* [1963] 2 WLR 935; [1964] AC 40, 76 per Lord Reid; GDS Taylor, 'Natural Justice - The Modern Synthesis' (1975) 1 *Monash University Law Review* 259, 263.

[661] Neil Andrews, *Arbitration and Contract Law: Common Law Perspectives* (Springer 2016), 103.

[662] *Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451, 471. See also, *Dimes v Grand Junction Canal* (1852) 10 ER 301, 315, in which Lord Campbell emphasised the important legal maxim that: 'no man is to be a judge in his own cause'. Although not arbitration cases, the principle applies, as noted by Lord Neuberger (n 547), equally to the process of arbitration.

procedural justice in litigation. This follows from Aristotle's formal principle of justice that like should be treated alike, and unalike should be treated differently. In the context of dispute resolution, the source of the adjudicator's authority is a relevant reason to justify different treatment, particularly as the source of the authority is party autonomy. It might be argued that, since it is only because of party autonomy that ICA exists as a viable form of dispute resolution, the rules of procedure, and hence what constitutes procedural justice, should be fully determined by the parties. This would be consistent with the autonomous model of arbitration discussed in chapter two. This model, however, is aspirational, with the hybrid model being more consistent with arbitration in practice.

Under the hybrid model, while the authority for arbitration derives from party autonomy, the process of arbitration remains dependent on the authority of the state, which must both permit arbitration within its jurisdiction as well as agree to enforce domestic and foreign arbitral awards through the national courts. This reliance on state authority requires the state to ensure, through national law, that arbitration is a just system of dispute resolution. Nevertheless, if the jurisdictional authority of the arbitrators is to genuinely derive from party autonomy then the state's interest should be sensitive to that autonomy. This does not mean that autonomy should be a trump, since justice is a vital interest. Rather, it requires that the parties' interest in autonomy must be balanced against the state's interest in justice.

This balance must be satisfied by at least a minimal concern with justice, which explains the courts' emphasis on natural justice. Although arbitration is a private form of dispute resolution, the role of the arbitrators is quasi-judicial and so has a public quality. Furthermore, the reliance of arbitration on the state for facilitation and enforcement means that arbitration cannot be a wholly private matter. For the state, a focus on procedural justice allows arbitration to resolve the dispute in a way that reflects party autonomy, but it also crucially ensures that justice is both done and seen

to be done.[663] In the context of arbitration, the balance between party autonomy and procedural justice means that the courts will take a less rigid approach to the rules of procedure than in litigation.[664]

Pullé highlights three issues that emphasise the importance of the state maintaining an interest in arbitration as a just, and hence legitimate, form of dispute resolution. First, arbitration may take place in a location with an immature arbitration culture, which, when combined with foreign proceedings and language, may raise concerns regarding the justness of proceedings. Second, arbitration may involve parties, such as those signing standard form contracts, who have no real choice regarding the option of arbitration for resolving disputes. Third, subjecting the enforceability of arbitral awards to limited grounds for appeal makes arbitration 'more potent than litigation'.[665] The state's interest in justice, however, must be balanced against the interests of party autonomy. After all, the parties have intentionally chosen arbitrators as commercial rather than legal experts and have chosen arbitration as a more flexible and less formal process than litigation.[666]

The view that, in the context of arbitration, the role of justice is tempered by a respect for party autonomy is supported by Bowsher J, who held that the principles of natural justice may not be applied as rigorously to the arbitration process as to litigation.[667] This is, at least in part, due to a respect for the binding nature of the NY Convention and a pro-arbitration culture encouraged by the state's desire not to appear hostile to

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[663] *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256, 259.

[664] *Groundshire v VHE Construction* [2001] 1 BLR 395, [40].

[665] Austin I Pullé, 'Securing Natural Justice in Arbitration Proceedings' (2012) 20 *Asia Pacific Law Review* 63, 65.

[666] Austin I Pullé, 'Securing Natural Justice in Arbitration Proceedings' (2012) 20 *Asia Pacific Law Review* 63, 66-67.

[667] *Groundshire v VHE Construction* [2001] 1 BLR 395, [40].

arbitration, so deterring valuable arbitration business.[668] Furthermore, the courts may be sceptical of claims for a breach of natural or procedural justice, resulting in a restrictive approach that requires not simply a procedural failure,[669] but a clear infringement of natural justice resulting in a patently unjust outcome.[670]

Extrajudicially, Lord Neuberger observed that: '[b]y the far the most common reason for refusing to enforce awards relate to the procedural fairness of arbitral proceedings themselves'.[671] Some of the claims may be disingenuous attempts to avoid an unfavourable award. There is, however, good evidence from psychological research that individuals are strongly affected by their perceptions of the procedural fairness of an adjudicatory process and are more likely to comply with a decision if they believe they were fairly treated.[672] Even where the individual sees the final award as unjust, the power of procedural justice is that it 'confer[s] legitimate authority on incorrect outcomes'.[673] The consequence of this conferred legitimacy is that individuals are more likely to respect an unfavourable decision where they perceive the procedure as just, emphasising the importance of ensuring that justice is both done and seen to be done.

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[668] Austin I Pullé, 'Securing Natural Justice in Arbitration Proceedings' (2012) 20 *Asia Pacific Law Review* 63, 68.

[669] See: *Lorand Shipping Ltd v Davof Trading (Africa) BV* [2014] EWHC 3521 (Comm), [22] per Eder J, accepting that the English Act sets a high threshold for procedural irregularities.

[670] Austin I Pullé, 'Securing Natural Justice in Arbitration Proceedings' (2012) 20 *Asia Pacific Law Review* 63, 67-68; *Groundshire v VHE Construction* [2001] 1 BLR 395, [40].

[671] Lord Neuberger, 'Arbitration and the Rule of Law' (Speech to the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 10 March 2015), para 26; (2015) 81 *Arbitration* 276, 282.

[672] Tom R Tyler, 'Procedural Justice' in Austin Sarat (ed) *The Blackwell Companion to Law and Society* (Blackwell Publishing Ltd 2004) 435, 440-441.

[673] Lawrence B Solum, 'Procedural Justice' (2004) University of San Diego Public Law and Legal Theory Research Paper Series, Paper 2, 7 <http://digital.sandiego.edu/lwps_public/art2> accessed 30 November 2017.

This psychological need for fair treatment establishes another interest that must be added to the balance, along with the individual's interest in autonomy and the state's interest in ensuring a just outcome that may be legitimately enforced. While party autonomy, as the immediate source of arbitral authority, is a crucial interest, procedural justice must be afforded sufficient weight to protect the interests of both the individual parties and the state. Informality, speed and flexibility may be valuable, but they must be balanced against the importance of a just process,[674] without which arbitration loses its legitimacy, its respect and its authority to resolve disputes. The whole point of arbitration is to resolve a dispute as effectively as possible. As Tyler notes:

> An ideally resolved conflict is one in which the parties involved accept the decisions ...; continue their relationship with each other; and feel good about the ... authorities with whom they dealt.[675]

This can only be achieved where the process of resolving the dispute is perceived as fair.[676] Central to the perception of fairness is the need for each party to have a "voice" in the decision-making process,[677] which - along with the neutrality of the adjudicator - is a principle of natural justice.

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[674] John Fellas, 'A Fair and Efficient International Arbitration Process (February/April 2004) *Dispute Resolution Journal* 79, 80.

[675] Tom R Tyler, 'Procedural Justice' in Austin Sarat (ed) *The Blackwell Companion to Law and Society* (Blackwell Publishing Ltd 2004) 435, 435-436.

[676] See, John Thibaut, Laurens Walker, *Procedural Justice: A Psychological Analysis* (Lawrence Erlbaum Associates 1975); E Allan Lind, Tom R Tyler, *The Social Psychology of Procedural Justice* (Springer 1988); Rebecca Hollander-Blumoff, 'The Psychology of Procedural Justice in the Federal Courts' (2011) 63 *Hastings Law Journal* 127.

[677] Joel Brockner, Grant Ackerman, Jerald Greenberg, Michele J Gelfand, Marie Francesco, Zhen Xiong Chen, Kwok Leung, Gunter Bierbrauer, Carolina Gomez, Bradley L Kirkman, Debra Shapiro, 'Culture and Procedural Justice: The Influence of Power Distance on Reactions to Voice' (2001) 37 *Journal of Experimental and Social Psychology* 300.

4.2.5 Arbitration and the rule of law

Along with academic consideration,[678] two recent speeches by the distinguished UK law Lords, Lord Hoffmann and Lord Neuberger, have focused on arbitration and the rule of law.[679] This raises two questions. First, is the rule of law applicable to arbitration? Second, if the rule of law is relevant, what are the implications for the arbitration tribunal and proceedings. Before addressing those questions, it should be noted that, while the rule of law is a Western term, the concept is not limited to the West. The very nature of the *Sharia* is that it applies equally to all and, as such, the essence of the rule of the law is inherent to *Sharia*.[680] Thus, the two questions noted above are not Western-centric and apply as much to arbitration in Saudi Arabia as to arbitration in Scotland.

For Lord Neuberger, the rule of law applies to arbitration because, *inter alia*, the quasi-judicial role of arbitrators requires them, like judges: 'to administer justice, and they must therefore act in accordance with the law and be seen to act in accordance with the law'.[681] Furthermore, the freedom and power afforded to arbitration, as an alternative to litigation, require the arbitrators to act with due responsibility and ensure that the parties' fundamental rights are protected. The validity of his view depends on one's conception of the rule of law.

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[678] See, eg: Richard C Reuben, 'Democracy and Dispute Resolution: The Problem of Arbitration' (2004) 67 *Law and Contemporary Problems* 279; Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 22 *Arbitration International* 495.

[679] Olga Boltenko, 'Hong Kong: Lord Hoffmann's Rule of Law musings' (2014) 10 *Global Arbitration Review*; Lord Neuberger, 'Arbitration and the Rule of Law' (Speech to the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong 10 March 2015).

[680] Tarek E Masoud, 'The Arabs and Islam: The Troubled Search for Legitimacy' (1999) 128 *Daedalus* 127, 195; Timur Kuran, 'The rule of law in Islamic thought and practice: a historical perspective', in James J Heckman, Robert L Nelson, Lee Cabatingan (eds), *Global Perspectives on the Rule of Law* (e-book edn, Routledge 2009) 71.

[681] Lord Neuberger, 'Arbitration and the Rule of Law' (Speech to the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 10 March 2015), para 8; (2015) 81 *Arbitration* 276, 277.

Narrowly construed, the rule of law applies solely to those working in positions of public authority, operating as a political tool to constrain the abuse of government power. In this conception, the rule of law provides substance to the formal Aristotelian principle of justice, that like should be treated alike, and unalike should be treated differently. That substance is simply that those in public positions of power are no different to any other person and should be equally subject to the law. In other words, there is no relevant reason why those in government should not be governed by the law in the same way as any private citizen. Given the explanatory theory that underlies this conception is that the rule of law operates to constrain public abuse of power, it seems of little relevance to ICA.[682] This is because the arbitrators gain their authority from the private agreement of the party and are not public officials. If, however, the conception of the rule of law is construed more widely, then it can be made relevant to arbitration.

The narrow conception of the rule of law is reflected in Waldron's description of the concept as a:

> crucial ideal … that is appropriately invoked whenever governments try to get their way by arbitrary and oppressive action or by short-circuiting the norms and procedures laid down in their countries' laws or constitution.[683]

Conceived narrowly, the rule of law clearly does not apply to arbitration, which is a private means for resolving disputes. While arbitration requires the support of the state and the national courts, it is not part of the government or state system.

A broader conception is apparent in Waldron's explanation that the rule of law: ‘give[s] central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms, rather than …

[682] It may, however, be relevant where a government or other public body is a party to the dispute.

[683] Jeremy Waldron, 'The Concept and Rule of Law' (2008) 43 *Georgia Law Review* 1, 5.

their own preferences'.[684] Here, the rule of law applies to anyone in a position of power over others, regardless of whether the source of the authority is public or private. Since arbitration involves the creation of a triadic power structure between the arbitrators and the disputing parties, there seems no good reason why it should not apply to constrain the arbitrators' power.

The narrow conception of the rule of law, restrictively applied, would be consistent with the autonomous model of arbitration as a system wholly independent of any national legal system. The broad conception, however, is reflected in the current approach in practice, in which national legal systems provide a supportive framework facilitating arbitration and ensuring that the awards are formally and procedurally just. Here, the rule of law adds weight and immense symbolic value to the argument that the state is both justified and has a duty to maintain sovereignty and ensure that any arbitration proceedings within its jurisdiction, and the enforcement of foreign awards, are governed by the principles of natural justice.[685] Furthermore, the rule of law is not a special rule constructed just for those in public positions of power, rather it applies to everyone to ensure that all persons are equally governed by the law.

The assumption behind the rule of law is that all private citizens are subject to the law. It demands that the law governs all equally: not just private citizens, but everyone, including those acting in a public or governmental office. This reflects Dicey's second sense of the rule of law,[686] which is that: 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm'.[687] This applies as much to arbitrators as to any other citizen, which means that any exercise of arbitral power should not be arbitrary, but should be governed by the same principles of justice that

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[684] Jeremy Waldron, 'The Concept and Rule of Law' (2008) 43 *Georgia Law Review* 1, 6.

[685] Lord Neuberger, 'Arbitration and the Rule of Law' (Hong Kong 10 March 2015) Speech to the Chartered Institute of Arbitrators Centenary Celebration, para 13; (2015) 81 *Arbitration* 276, 279.

[686] Dicey provides three different meanings for the rule of law.

[687] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (8th ed (1915), Liberty Classics 1982), 114.

govern the application of the law.[688] Furthermore, effective dispute resolution is part of the core aspect of democratic governance that is concerned with the administration of justice.[689] This creates a strong public interest in the system of arbitration as an effective means of securing a just outcome for private disputes.[690] As such, arbitration must be subject to the rule of law, which is part of the democratic armoury necessary to legitimise any process that affords one person power over another.

Since, as has been argued, the rule of law applies to arbitration, the next issue is to identify the implications, if any, for arbitration proceedings. At the least, the rule of law adds symbolic weight to the need to ensure a basic level of formal and procedural justice. This means that the law applies as equally to arbitrators as to any other quasi-judicial decision-maker, which again emphasises the relevance of natural justice. It also means that relevant distinctions between arbitration and litigation must be recognised and reflected in the formal and procedural requirements. In other words, the rule of law requires attention to the formal and procedural elements of arbitration.[691] This does not require that the context of arbitration be ignored. To the contrary, the rule of law should be context sensitive. Thus, the private, flexible and informal nature of arbitration should be acknowledged when determining whether arbitration proceedings are formally and procedurally just.

Lord Bingham identified 8 attributes (or 'sub-rules') that may be identified from the application of the rule of law.[692] Lord Neuberger tried, more-or-less successfully, to

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[688] This reflects Dicey's first sense of the Rule of Law: AV Dicey, *An Introduction to the Study of the Law of the Constitution* (8th ed (1915), Liberty Classics 1982), 110.

[689] Richard C Reuben, 'Democracy and Dispute Resolution: The Problem of Arbitration' (2004) 67 *Law and Contemporary Problems* 279, 280-281.

[690] Geoffrey Ma CJ, 'Opening address' (2015) 81 *Arbitration* 299, 301.

[691] Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 22 *Arbitration International* 495, 497.

[692] Tom Bingham, 'The Rule of Law' (Penguin 2011); Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67.

fit these to the context of arbitration.[693] His approach, while bold, is unnecessary since many of these 8 attributes are not part of the core concept, but reflect different, and context dependent, conceptions of the rule of law. Thus, in the context of the arbitration proceedings it is appropriate to identify and apply only those attributes that are relevant. The attributes are:[694]

1. 'the law must be accessible ... intelligible, clear and predictable';
2. 'questions of legal right and liability should be resolved by application of the law and not … discretion';
3. 'the laws of the land should apply equally to all';
4. 'the law must afford adequate protection of human rights';
5. 'means must be provided for resolving without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve ... everyone ... should be able, in the last resort, to go to court';
6. 'public officers ... must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers';
7. 'adjudicative procedures provided by the state should be fair';
8. 'compliance by the state with its obligations in international law'.

The most fundamental attribute is that the law applies equally to all. As noted earlier, this both justifies and requires the state to ensure arbitration is subject to relevant legal rules implementing an arbitration system that is consistent with natural justice, without undermining the nature of arbitration as a flexible, informal and private system. While arbitration is a private system of dispute resolution and so not directly provided by the state, the supportive legal framework that enables arbitration engages

[693] Lord Neuberger, 'Arbitration and the Rule of Law' (Speech to the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 10 March 2015); (2015) 81 *Arbitration* 276.

[694] Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 69-85

the seventh of Lord Bingham's attributes. Furthermore, it might be argued that limiting the seventh attribute to procedures provided by the state is unduly restrictive. If the rule of law is intended to apply to all citizens to prevent the abuse of power, then all adjudicative processes should be fair, regardless of whether they are public or private. An alternative way of achieving the same conclusion is to argue that adjudicative processes are quasi-judicial and so public in nature, if not in the immediate source of the adjudicator's authority. Thus, they should be subject to the rule of law and the same requirements as those adjudicative processes more immediately connected to the state as a source of authority.

Although it may be relevant to the state's obligations under the NY Convention, in the specific context of the arbitration proceedings themselves the eighth attribute has little relevance. Given the private nature of arbitration, the fourth attribute of the formal protection of human rights, is of limited relevance. Even as a private system, however, it is arguable that the quasi-judicial nature of arbitration requires that the parties have a right to a fair trial. Thus, the European Court of Human Rights (ECtHR) held that '[t]he principle of the rule of law and the notion of fair trial enshrined in article 6 [of the ECHR]' applied to arbitration to preclude the Greek government from interfering through legislation with the administration of justice in the dispute before the court.[695]

[695] Application No 13427/87 *Stran Greek Refineries and Sratis Andreadis v Greece*, Series A No 301-B; (1995) 19 EHRR 293. In Case No 31737/96 *Suovaniemi v Finland*, 23 Feb 1999, the ECtHR held that, while the article 6 right to a fair trial applied, certain aspects of the right, such as the right to a public hearing, could be waived through an agreement to arbitrate. The implication is that article 6 applies to arbitration, but may be partially waived with the informed consent of the parties. The extent of the waiver will depend on the arbitration agreement between the parties, but it is unlikely to allow a hearing that is manifestly unfair: David Altaras, 'Arbitration in England and Wales and the European Convention on Human Rights: should arbitrators be frightened?' (2007) 73 *Arbitration* 262, 266. Thus, article 6 allows the parties to benefit from the private, flexible and informal nature of arbitration, while still providing a basic guarantee of a fair hearing within the constraints of the terms of the agreement. See also: Paula Hodges, 'The relevance of Article 6 of the European Convention on Human Rights in the context of arbitration proceedings' (2007) 10 *International Arbitration Law Review* 163.

Furthermore, the state should ensure that the parties' interest in privacy is given adequate protection through the legal framework for arbitration. Although the parties' interest in privacy should be protected, it may nevertheless need to be balanced against competing interests that require greater transparency. In *Ali Shipping Corporation v Trogir*, for example, the English Court of Appeal held that confidentiality was so inherent to the arbitration that an obligation of confidence was implied by an arbitration agreement. This duty, however, was not absolute and could be limited by, *inter alia*, the public interest in justice.[696]

The remaining attributes (one, two, five and six), are concerned with both formal and procedural justice and should apply to arbitration for two main reasons. First, arbitration is a quasi-judicial system that affects the parties' legal rights. Second, arbitration is enabled, facilitated and legitimated by the state through the national laws that regulate it. Thus, because it is a state-endorsed system that provides third parties with the power to alter the legal rights and obligations of the affected parties, arbitration should be subject to those formal and procedural attributes of the rule of law. Thus, both the legal framework and the applicable procedural rules of arbitration should be 'accessible ... intelligible, clear and predictable'; arbitration decisions should not be arbitrary, but should be based on the applicable law or set of principles as agreed by the parties; the proceedings should be efficient and should allow the parties the right to litigate procedural issues that raise questions of justice while limiting the opportunity for procedural delaying tactics;[697] and the arbitrators should act in good faith, without exceeding their authority.

If, then, the rule of law is to demand anything of arbitration, it is that the system should be just. This means that arbitration must function within a framework of principles and rules designed to ensure that each party to the dispute is treated fairly and that those rules are respected by the arbitrators and, where necessary, enforced

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[696] See *Ali Shipping Corporation v Trogir* [1999] 1 WLR 314, 327-328.

[697] Emmanuel Gaillard, 'Abuse of Process in International Arbitration' (2017) 32 *ICSID Review* 17.

by the courts. Each party should be afforded an equal opportunity to be heard by impartial arbitrators who resolve the dispute by reasoned decision-making based on the substantive laws or principles agreed to by the parties. The rule of law may linguistically be anathema to arbitration, particularly the autonomous model of arbitration. The spirit of the concept, however, is the rejection of the arbitrary and partial exercise of power,[698] which ought to be the goal of any just system of dispute resolution, whether public or private. Symbolically, rhetorically and politically, the rule of law is an important tool for countering the abuse of power and this can be similarly applied to arbitration as to any quasi-judicial system. Substantially, however, it does little more, at least in the context of arbitration proceedings, than to emphasise the importance of formal, natural and procedural justice.

4.3 The Law Governing Arbitration Proceedings

Before considering the law in practice, it may be helpful to summarise the desirable features of the arbitration process. From the discussion above, arbitration should be: fair and just; clear, predictable and reliable; efficient and cost-effective; capable of effectively resolving disputes through an enforceable award; and sufficiently flexible to meet the reasonable needs of the parties. From the parties' perspective, these are all important. The process, however, would be meaningless in the absence of an acceptable and enforceable final award. For the parties, the award is more likely to be acceptable where the process is at least procedurally just. For the state, the process must at least satisfy the requirements of natural justice. One point where the interests of the parties and the state may clash is the question of confidentiality. From the parties' perspective, confidentiality is important for commercial reasons. For the state, however, transparency is important to ensure that justice is both done and seen to be done. Furthermore, since transparency enables the flow of information and knowledge, it may also be important for the development of arbitration.

[698] Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 72.

In the analysis that follows, the discussion will be according to the demands of justice. It should, however, first be noted that, when it comes to providing a legislative framework for arbitration, the Scottish Act and the SAL 2012 have a significant advantage over the Model Law. While the Model Law must provide a framework that meets the interests and needs of different sovereign nations, national laws must only meet the interests and needs of their respective countries. Although compromises may be required to attract ICA business, a national legislature can still provide a more comprehensive framework, with specific procedural rules that facilitate a just system of arbitration within the national context of law and commerce. In the context of Saudi Arabia, this most notably requires compliance with the *Sharia*. The relevance of the *Sharia* was introduced in chapter one and will be considered further in chapter six. For present purposes, however, it should be noted that the main procedural concern of the *Sharia* is that all parties to a dispute should have an equal opportunity to be heard. This is consistent with natural justice and due process. Indeed, it has been noted that: 'The *Sharia* rules relating to arbitral procedures do not seem to clash with modern arbitration practices'.[699]

4.3.1 Equality and justice

Article 18 of the Model Law requires that: '[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'. As the most fundamental principle of formal justice, this obligation is 'applicable to the entire arbitral proceedings'.[700] The overarching effect of article 18 makes it the most significant provision governing the arbitration proceedings. In the original draft, this provision was simply to be a sub-provision of article 19, but by placing it in its current form, UNCITRAL has symbolically emphasised the fundamental importance of the

[699] Mutasim Ahmad Alqudah, 'The Impact of Sharia on the Acceptance of International Commercial Arbitration in The Countries of the Gulf Cooperation Council' (2017) 20 *Journal of Legal, Ethical and Regulatory Issues* 1, 11.

[700] UNCITRAL, *Report of the UN Commission on International Trade Law (on the work of its eighteenth session)*, Official Records of the General Assembly, Fortieth Session, Supplement No 17, A/40/17 (UN 1985), para 176.

principle. As an independent provision, it has a prominent place that befits a principle forming the bedrock of any just system of dispute resolution.

The first part of article 18 is the formal principle of equality. As discussed above, equality is empty of substance, demanding nothing beyond equal treatment. This is a requirement of the rule of law and follows from the view that all human beings are afforded the same status of human dignity simply by being a member of the human community in the context of a democratic civil society.[701] The second part of the article reflects the principle of natural justice (*audi alterem partem*) that each party should have the opportunity to be heard. It ensures that both parties have a voice, which is essential for a psychological appreciation that the process is fair.[702]

Article 18 provides for such a fundamental principle that the parties should not be allowed to derogate from it or exclude it as a justification for having any award set aside under article 34.[703] Given its fundamental nature, it is unsurprisingly a mandatory provision,[704] which constrains the parties' freedom to determine the procedural rules, ensuring that they apply equally to both parties and that each party

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[701] Jeremy Waldron, Meir Dan-Cohen (ed) Dignity, Rank and Rights: The Berkley Tanner Lectures (Oxford University Press 2012); also available as New York University School of Law, Public Law & Legal Theory Research Paper No 09-50, 26 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461220##> accessed 30 November 2017.

[702] Joel Brockner, Grant Ackerman, Jerald Greenberg, Michele J Gelfand, Marie Francesco, Zhen Xiong Chen, Kwok Leung, Gunter Bierbrauer, Carolina Gomez, Bradley L Kirkman, Debra Shapiro, 'Culture and Procedural Justice: The Influence of Power Distance on Reactions to Voice' (2001) 37 *Journal of Experimental and Social Psychology* 300; Lawrence B Solum, 'Procedural Justice' (2004) University of San Diego Public Law and Legal Theory Research Paper Series, Paper 2, 7-8 <http://digital.sandiego.edu/lwps_public/art2> accessed 30 November 2017.

[703] *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454 (CA New Zealand). In *Noble China Inc v Lei Kat Cheong* (1998) 42 OR (3d) 69, Lax J held that the right to apply to a court to have an award set aside under article 34 could be excluded by the agreement of the parties. This was not contrary to article 18. While this would prevent a party from having an award set aside for a breach of natural justice, it would not preclude a court from refusing to enforce an award, on public policy grounds, for a breach of article 18. Thus, while the effect of article 18 may be constrained by allowing article 34 to be excluded, it still retains its power to nullify an award where there has been a breach of natural justice.

[704] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86; [2007] SGCA 28 (Singapore).

has the opportunity to present its case and defend any claim against it.[705] In *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*, Rajah JA held that:

> it is an indispensable … requirement in every arbitration that the parties should have an opportunity to present their respective cases as well as to respond to the case against them ... all established legal systems require parties to be treated fairly ... includ[ing] the opportunity to be heard and the equality of treatment.[706]

Article 18 applies to all stages of an arbitration, including: adequate notice of any hearings; the opportunity for each party to present its case; the opportunity to attend any hearings and to review and rebut the other party's case; and to receive all pertinent documentation.[707] To satisfy the requirement, the tribunal 'must give the parties a "fair opportunity to address its arguments on all of the building blocks in the tribunal's conclusions"'.[708] It also includes the requirement that the parties are given the opportunity to respond to a point that the 'arbitrator is impressed by', but which was not raised by the other party.[709] Thus, it protects the vital interests of each party against procedural impropriety, but should not serve to protect them against bad choices or a failure to exercise one of the rights afforded to them.[710]

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[705] Caroline Asfar Cazenave, Marie Fernet, 'The uniform law on international commercial arbitration' (2014) 3 *International Business Law Journal* 219, 234.

[706] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86; [2007] SGCA 28, [42].

[707] *Trustees of Rotoaira Forest Trust v Attorney-General, High Court* (Commercial List) [1999] 2 NZLR 452 (New Zealand); *Attorney-General v Tozer (No 3),* High Court, Auckland, New Zealand, 2 September 2003, M1528-IM02 CP607/97.

[708] *OAO Northern Shipping Company v Remol Cadores De Marin SL* [2007] EWHC 1821 (Comm), [22] per Gloster J, quoting from *ABB AG v Hochtief Airport [2006] 2 Lloyd's Rep* 1, [70].

[709] *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] EGLR 14, 15. See also: *Lorand Shipping Ltd v Davof Trading (Africa) BV* [2014] EWHC 3521 (Comm) [25].

[710] CLOUT case No 391, *Re Corporación Transnacional de Inversiones, SA de CV et al v STET International,* SpA et al, Ontario Superior Court of Justice, Canada, 22 September 1999, [1999] CanLII 14819 (ON SC).

Whether there has been a breach of procedural fairness or natural justice should be assessed objectively.[711] The threshold for establishing a breach is generally set quite high. In *Corporation Transnacional de Inversiones, SA de CV v STET*, Lax J held that:

> to justify setting aside an award for a violation of Article 18, the conduct of the Tribunal must be sufficiently serious to offend our most basic notions of morality and justice.[712]

Furthermore, the right to be heard does not include the right to a particular form of hearing. Thus, where appropriate, the right would be satisfied by the opportunity to present written submissions and would not necessarily be breached by the refusal of a request for a hearing in person.[713]

Turning to the Scottish Act, s.1 establishes the founding principles that apply to the interpretation and implementation of all substantive provisions. This is both symbolically and practically important since the founding principles 'underpin all questions of arbitration in Scotland',[714] including the procedural rules, whether mandatory or default. In this regard, they play a similar role to article 18 of the Model Law. There is, however, an obvious distinction in the wording of the provisions. Rather than requiring an overarching duty of equal treatment, s.1(a) states that: 'the object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense'.

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[711] *Acorn Farms Ltd v Schnuriger* [2003] 3 NZLR 121 (New Zealand).

[712] *Corporation Transnacional de Inversiones, SA de CV v STET* (1999) 45 OR (3d) 183; (1999) CanLII 14819, (Ontario SC, Canada); see also, *Xerox Canada Ltd v MPI Technologies Inc* (2006) CanLII 41006 (Ontario SC, Canada).

[713] CLOUT case No 659, Oberlandesgericht Naumburg, Germany, 10 Sch 08/01, 21 February 2002 <http://www.dis-arb.de/de/47/datenbanken/rspr/olg-naumburg-az-10-sch-08-01-datum-2002-02-21-id166> accessed 30 November 2017.

[714] *Arbitration Application (No 1 of 2013)* [2014] CSOH 83, [10] per Lord Woolman.

Although the Scottish Act refers to fairness and impartiality, rather than equality, this is unlikely to be of practical significance since, in the context of arbitration proceedings, a duty of fairness and impartiality implies equality of treatment. A more significant difference is that, while article 18 of the Model Law requires that the 'parties shall be treated with equality', s1 of the Scottish Act only requires that those interpreting and applying the Act 'have regard to the founding principles'. The duty to 'have regard' implies that the founding principles must be given due consideration, which allows scope for discretion when construing the Act and leaves open the possibility for deciding that other factors are more important. It is a less strict duty than that required by the more imperative command of 'shall be treated', which leaves no room for discretion. It would have been better to eliminate that small window of discretion and impose a stronger obligation, requiring that any interpretation and application of the Act be consistent with the founding principles. Hopefully, however, the courts focus on the spirit of the principles, rather than the literal wording of the section.

Section 1(a) goes beyond the obligation of equal treatment and helpfully emphasises that arbitration proceedings should be as efficient as possible regarding both time and money. This reflects the formal goal of promoting 'Scottish arbitration as a cost-effective and efficient choice'.[715] Section 1(a) also reflects the key policy objective of ensuring 'fairness and impartiality in the process'.[716] Relying on existing jurisprudence, this means that arbitration must comply with the principles of natural justice. As the Lord President argued, in *Forbes v Winton*, that 'the position of an arbiter is very much like that of a judge' and carries similar obligations.[717] In *Kyle and Carrick District Council v AR Kerr & Sons* the duty to apply the rules of natural justice was made explicit, with Lord Penrose concluding that the court had jurisdiction:

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[715] David Wilson, 'The Resurgence of Scotland as a Force in International Arbitration: The Arbitration (Scotland) Act 2010' (2010) 27 *Journal of International Arbitration* 679, 684.

[716] Arbitration (Scotland) Bill: Policy Memorandum (2009), para 26.

[717] *Forbes v Winton* (1886) 13 R 465, 467-468.

> to review the procedures adopted by arbiter and to decide whether decrees have proceeded ... in accordance with the interests of substantial justice as reflected for example in the traditional rules of natural justice.[718]

Considering now the SAL 2012. With the support of 'about 300 verses' of the *Qur'an*, justice is considered 'a central principle in Islam'.[719] In chapter 16, verse 90 of the *Qur'an*, for example, it states: 'Surely Allah enjoins justice'.[720] This obligation of justice is founded on the equality of all persons before Allah, which follows from the origins of all humankind in a single soul.[721] Given the importance of justice and equality to Islam and the *Sharia*,[722] it is not surprising that the SAL 2012 faithfully reproduces article 18 of the Model Law. Thus, article 27 of the SAL 2012 requires that all parties are 'treated on an equal footing' and provided with a 'full and equal opportunity to present their case or defence'. This latter obligation, as noted above, is consistent with the *Sharia*, which also demands that all parties to a dispute have an equal opportunity to be heard.[723]

It is clear, then, that the overarching formal justice principle of equality required by article 18 of the Model Law, is given expression in both the Scottish Act and the SAL

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[718] *Kyle and Carrick District Council v AR Kerr & Sons* 1992 SLT 629, 633. See also Lord Philip in *Re Partners of Dallas McMillan* [2015] CSOH 136, [35].

[719] Emad El-Din Shahin, 'Government' in Gerhard Bowering (ed) *Islamic Political Thought: An Introduction* (Princeton University Press 2015) 68, 70.

[720] English translation of the Qur'an by Maulana Muhammad Ali (2002) <http://www.muslim.org/english-quran/quran.htm> accessed 30 November 2017.

[721] Emad El-Din Shahin, 'Government' in Gerhard Bowering (ed) *Islamic Political Thought: An Introduction* (Princeton University Press 2015) 68, 70. Shahin relies on chapter 4, verse 1 of the Holy *Qur'an*.

[722] Ahmad S Moussalli, *Moderate and Radical Islamic Fundamentalism* (University Press of Florida 1999), 62-63.

[723] Mutasim Ahmad Alqudah, 'The Impact of Sharia on the Acceptance of International Commercial Arbitration in The Countries of the Gulf Cooperation Council' (2017) 20 *Journal of Legal, Ethical and Regulatory Issues* 1, 11.

2012. Although the Scottish Act is drafted in terms of fairness rather than equality, the obligation imposed by the relevant provisions is essentially the same. The caveat to this is, as discussed above, the apparently greater scope for discretion under the Scottish Act. It is, however, unlikely that this discretion will have any effect in practice on the requirements of justice and equal treatment.

4.3.2 The natural justice principle of *audi alterem partem*

As noted previously, this principle requires that both parties have an equal right to be heard. This means that both parties must have an equal opportunity to present their case or defence as provided for by article 18 of the Model Law and article 27 of the SAL 2012. This obligation is implicit to the founding principle set down in s.1(a) of the Scottish Act and is more explicitly provided for by mandatory r.24, which puts the principles of natural justice on a statutory basis. Under this rule, the tribunal must 'treat the parties fairly' by, *inter alia*, 'giving each party a reasonable opportunity to put its case and deal with the other party's case'. It should be noted that while the Model Law and the SAL 2012 require that both parties are given 'full ... opportunity' to present their case, r.24 of the SAR only requires that the parties be given 'a reasonable opportunity'. The Scottish approach appears to be more flexible, affording some discretion to arbitrators. It is arguable, however, that there will be little difference in practice since the concept of 'full ... opportunity' is likely to be interpreted objectively and determined by what is reasonable in the circumstances.

Having set down the formal requirement, it could have been left to the courts to further define the specific rules. This would require cases to be brought before the courts and is potentially a long, drawn-out process sustaining uncertainty until the rules are more fully determined. While this has the advantage of allowing the law to be responsive to the circumstances of the cases, it is contingent on appropriate cases being brought before the courts. Furthermore, the uncertainty that persists while the rules are in the process of development makes the outcome of a case less predictable. While the need for interpretation and judicial discretion is unavoidable, the formal justice requirements for certainty and predictability require that discretion to be

limited. This achieves a balance between those elements of formal justice and the discretion that facilitates a more substantively just decision by allowing judges to be more sensitive to the circumstances of the case. Consistent with this, the Model Law, the Scottish Act and the SAL 2012 all provide for greater certainty by further specifying more fully determined rules.

Article 21 of the Model Law provides a default rule specifying that, subject to the parties' agreement, arbitral proceedings 'commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent'. A similar requirement is found in default r.1 of the SAR and in the default rule under article 26 of the SAL 2012. Although this obligation may be varied by the parties' agreement, any such variation would still need to provide an effective mechanism for notifying the other party. As such, and consistent with international practice, it ensures that the arbitration cannot lawfully commence until the respondent party has received an adequate notice,[724] allowing the party to appreciate the nature of the dispute to be arbitrated. This is a crucial prerequisite for ensuring an equal opportunity for the party to present its case. Indeed, the importance of the request is reflected in article 9 of the IRSAL 2017. This provides for the minimum content of the request, which includes: the name of the claimant and his or her representative; a summary of the contractual relationship and arbitration agreement; a summary of the 'claimant's request for relief'; and notice of the claimant's nominated arbitrator, or 'proposal for the appointment of a sole arbitrator' where the constitution of the panel has not been determined by the arbitration agreement.

Another important consideration is that the arbitration is conducted in a juridical location and venue that do not prejudice a party's ability to present its case. Article 20 of the Model Law allows the tribunal the default power to determine both the juridical location, or "seat", and the physical meeting place, or "venue", for the arbitration

[724] *Fung Sang Trading Ltd v Kai Sun Products & Food Co Ltd* [1991] HKCFI 190 (Hong Kong), [25-30].

proceedings.[725] Article 20 of the Model Law is implemented by Article 28 of the SAL 2012. In the Scottish Act, s.3(1)(a)(iii) allows the tribunal to determine the location and default r.29 allows the tribunal to choose the venue.

While these provisions appear to provide the tribunal with absolute discretion to determine the venue, they are still subject to the overarching principles of fairness and equality. This means that the power afforded the tribunal must be exercised fairly, with equal consideration given to the interests of the party, including a fair notice of the location and venue.[726] With specific regard to the location, article 20(1) of the Model Law and article 28 of the SAL 2012 require the tribunal to also 'have regard to the circumstances of the case',[727] which means having:

> regard to any connections with one or more particular countries that can be identified in relation to (i) the parties; (ii) the dispute which will be the subject of the arbitration; (iii) the proposed procedures in the arbitration, including (if known) the place of interlocutory and final hearings; (iv) the issue of the award or awards.[728]

While not making any such conditions explicit, s.3 of the Scottish Act would still be subject to the founding principles set down in s.1 and the general duties imposed on the tribunal by mandatory r.24. This is likely to require the tribunal to similarly consider the circumstances of the case when determining the location. These constraints, if respected, should ensure that the choice of location is at least pragmatically reasonable and equally fair to both parties.

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[725] *Shashoua v Sharma* [2009] EWHC 957 (Comm), [2], distinguishing the "venue" from the "seat" of arbitration.

[726] *Sulaikha Clay Mines v Alpha Clays* (2005) 1 Arb LR 237 (India) <http://indiankanoon.org/doc/252644/> accessed 30 November 2017.

[727] Model Law, article 20(1)

[728] *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 All ER 514 (Comm), [52].

4.3.2.1 Choice of language

Because an inability to understand the language of the proceedings may affect a party's ability to participate, the main issue is to ensure that the choice of language rules do not prejudice a party's opportunity to present its case or respond to the other party's case.[729] By allowing the parties to determine the language of proceedings, article 22 of the Model Law protects the parties' right to natural justice. This is supplemented by the default power afforded to the arbitrators, who may also order translations of documentary evidence under article 22(2). A similar default power is afforded by r.28(g) of the Scottish Act. Article 29 of the SAL 2012, however, provides that Arabic is the default language.

Since article 29 still leaves the parties, or tribunal, entirely free to determine the language, it represents a symbolic compromise allowing a significant liberalisation compared to the old Law,[730] which imposed Arabic as the mandatory language.[731] More importantly, the wording of article 29 fails to indicate any priority for the parties' agreement to preclude the authority of the tribunal to determine the language. While this could allow the tribunal to require the arbitration to be conducted in Arabic, the overarching effect of article 27 constrains the tribunal's power and should prevent it from being exercised in a way that prejudices the party's ability to present its case. As such, despite the wording of the provision, article 29 should provide a similar protection of the parties' right to be heard as the equivalent provisions of the Model Law and the Scottish Act.

4.3.2.2 Statements

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[729] Oberlandesgericht München, Germany, 34 Sch 26/08, 22 June 2009, SchiedsVZ 2010, 169 <http://www.dis-arb.de/de/47/|datenbanken/rspr/olg-münchen-az-34-sch-26-08-datum-2009-06-22-id1065> accessed 30 November 2017.

[730] Faris Nesheiwat, Ali Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia' (2015) 13 *Santa Clara Journal of International Law* 443, 448.

[731] Jean-Pierre Harb, Alexander G Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 *Journal of International Arbitration* 113, 119.

The principle of *audi alterem partem* necessarily requires that the dispute is clearly stated. For a party to establish a defence it is first necessary to have a clear statement of the claim. Similarly, the party making the claim needs to know the other party's defence to fully present their case to the tribunal. Furthermore, clear statements of claim and defence are necessary for the arbitrators to understand the dispute and the scope of their jurisdiction.

Article 23 of the Model Law requires the parties to make clear statements of claim or defence. Since it is essential that both the parties and the arbitrators know what is to be adjudicated, article 23 is mandatory. This means that arbitration cannot proceed in the absence of adequate statements.[732] However, the parties have the power to alter the elements of the statements, which by default must include: the supporting facts; the points of dispute and the remedy sought. Even though the parties may use the arbitration agreement to vary the required elements, the statements must still be sufficient, when read with the benefit of the notice of request and the contract, to determine the scope of the arbitration.[733] Where the arbitration tribunal considers the statements to be inadequate, it may invite the parties to amend them to correct any deficiencies and ensure that the subject and scope of the arbitration is sufficiently well defined to allow a just adjudication.[734]

While statements of claim and defence rule are mandatory under the Model Law, default r.28(2)(b) of the SAR provides that 'the tribunal may determine ... whether parties are to submit claims or defences'. The word “may” appears to suggest that the tribunal has the discretion to waive the need for any formal statements of claim and defence. As with any provision of the Scottish Act, this is subject to the founding

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[732] Bayerisches Oberstes Landesgericht, Germany, 4 Z Sch 02/99, 29 September 1999 <http://www.dis-arb.de/de/47/datenbanken/rspr/bayoblg-az-4-z-sch-02-99-datum-1999-09-29-id18> accessed 30 November 2017.

[733] *Quintette Coal Ltd v Nippon Steel Corp* [1991] 1 WWR 219; [1990] BCJ No 2241 (BC CA, Canada), [18-21].

[734] *Alenco Inc v Niska Gas Storage US, LLC* [2009] ABQB 192 (Alberta QB, Canada).

principles under s.1 and the general duties of the tribunal imposed by mandatory r.24, which should constrain the tribunal's discretion to prevent a breach of natural justice. Nevertheless, the implication of the rule is that the statements are not essential, even though they provide valuable information that helps both the tribunal to determine the scope of its jurisdiction and the parties in deciding how best to respond to the other party's case. Given that statements of claim and defence are standard practice in arbitration cases,[735] it seems unlikely that a tribunal would not require the parties to submit them. Indeed, the need for, and the importance of, statements of claim and defence contrarily appears to be confirmed by r.37, which deals with how the tribunal should respond where there has been a failure to submit a statement of claim or defence.

Implementing article 23 of the Model Law, article 30 of the SAL 2012 requires the parties to submit statements of claim or defence.[736] Like the Model Law, this is mandatory, with the time-frame determined by agreement, or as a default by the tribunal. Varying from the Model Law, article 30 imposes a duty on the relevant party to submit their statement to the other party and to all the arbitrators. Under the Model Law, the statements need only be submitted to the arbitration tribunal, which then has the responsibility under article 24(3) to communicate the statement to the other party. Although providing more specific details of what should be included in the statements, article 30 of the SAL 2012 is consistent with the Model Law except for one important difference. Under article 23(2) of the Model Law, the parties may, subject to the tribunal's approval, 'amend or supplement [their] ... claim or defence during … the arbitral proceedings'. Under article 30 of the SAL 2012, claimants may not amend their claim, but the respondent is permitted to subsequently raise additional defences provided the tribunal is satisfied that there are 'reasons for the delay'.

[735] See eg, Chartered Institute of Arbitrators, *Scottish Short Form Arbitration Rules* (2012), 4.3.

[736] Supported by article 6, which sets out the conditions that determine whether the delivery of the notification has been fulfilled.

This appears to treat the respondent more favourably than the claimant. However, it is arguable that differential treatment is justified and, therefore, that the parties are treated fairly as equals. This follows because, at the start of any adjudication, the claimant will know the full circumstances of the claim and should be well placed to determine its scope and content. The respondent, however, may have less complete knowledge of the circumstances, which may only become apparent during the proceedings. Permitting respondents to amend their defences allows this imbalance of information to be managed. Giving the tribunal the authority to refuse to allow such amendments in the absence of good reasons for the delay means that the respondent should be prevented from unjustly using the power for a strategic advantage. Thus, these provisions appear to be fair, but it is arguable that the Scottish approach, which simply allows the tribunal complete discretion, subject to the parties' agreement, is preferable. Nevertheless, any impact on the claimant will be lessened by article 32 of the SAL 2012, which allows either party, subject to the tribunal's approval, to 'review or compliment the relief it has claimed within the course of the proceedings'.

4.3.2.2 The right to be heard

To protect the parties' right to be heard, article 25(a) of the Model Law provides for the default rule that the tribunal must terminate the proceedings if, without sufficient cause, 'the claimant fails to communicate his statement of claim in accordance with article 23(1)'. This is mandatory for the proceedings relating to the claimant's case,[737] but should not result in the termination of proceedings in relation to the respondent's counter-claim.[738] Under article 25(b), the respondent's failure 'to communicate his statement of defence' must not lead to the termination the proceedings. These must be continued 'without treating such failure in itself as an admission of the claimant's allegations', but the arbitration tribunal is allowed to consider the causes of any such

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[737] Bayerisches Oberstes Landesgericht, Germany, 4 Z Sch 02/99, 29 September 1999 <http://www.dis-arb.de/de/47/datenbanken/rspr/bayoblg-az-4-z-sch-02-99-datum-1999-09-29-id18> accessed 30 November 2017.

[738] *Indian Oil Corporation Ltd v Atv Projects India Ltd* (2004) DLT 701 (Delhi HC, India) <http://indiankanoon.org/doc/1944087/> accessed 30 November 2017.

failure and draw appropriate inferences, even if adverse.[739] Under article 25(3), the failure of a party 'to appear at a hearing or to produce documentary evidence' allows the tribunal the discretion to 'continue the proceedings and make the award on the evidence before it'. This article importantly allows the arbitration tribunal to continue with proceedings where one of the parties fails to cooperate, although the tribunal must still give notice of hearings to the uncooperative party and ensure that it retains the opportunity to be heard.[740]

Under the Scottish Act, default r.38 of the SAR provides for a similar response to article 25(3) of the Model Law where a party fails to attend a hearing or provide evidence. Default r.37 applies to the failure to submit a statement of claim or defence and is also similar to the Model Law provision. Rule 37, however, gives the tribunal greater discretion to continue proceedings. Differing from the Model Law requirement that the proceedings be terminated where a statement of claim is not submitted timeously, r.37 only obliges the tribunal to terminate proceedings where the delay:

> (c) …
>
> (i) gives, or is likely to give, rise to a substantial risk that it will not be possible to resolve the issues in that claim fairly, or
>
> (ii) has caused, or is likely to cause, serious prejudice to the other party.

Allowing the tribunal such discretion, subject to the contrary agreement of the parties, should allow some arbitrations to proceed that would otherwise be terminated under the rigid approach of the Model Law, while at the same time ensuring that justice for both parties is preserved.

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[739] *M/S Prime Telesystem Limited v Sasken Communication Technologies Ltd*, High Court of Delhi India, 18 December 2009, OMP 35/2008 [2009] INDLHTC 5430 <http://indiankanoon.org/doc/53159237/> accessed 30 November 2017.

[740] CLOUT case No 968, Coruña Provincial High Court, Spain, Section 6, Case No 241/2006, 27 June 2006.

Under the SAL 2012, articles 34 and 35 effectively implement article 25 of the Model Law with one notable substantive difference.[741] Unlike article 25(b) of the Model Law, article 34 of the SAL 2012 does not preclude the tribunal from taking any failure to submit a statement of defence as an admission of the other party's claims. This allows the tribunal the discretion to take the failure into account, but that discretion remains subject to the overarching principles of equality and justice. Whether it is of practical significance will depend on how the tribunal approach the matter in practice.

It should be noted that the Model Law, the Scottish Act and the SAL 2012 all provide for different consequences depending on whether the claimant or respondent fails to submit their respective statement. Where the claimant fails to submit a statement then proceedings must be terminated. Where, however, the respondent fails to submit a statement, then proceedings must continue. While this treats the parties differently, it does not conflict with the formal justice principle of equal treatment under article 18 of the Model Law. This follows because the claimant has initiated the arbitration proceedings so creating a responsibility to submit details of the claim. Since the statement of claim is essential to establishing the content and scope of the arbitration tribunal's jurisdiction, and since the proceedings only come into existence because of the claimant's acts, it is reasonable to terminate proceedings where the statement is not submitted. If the tribunal's jurisdiction is not clearly defined *ab initio*, this prejudices the respondent's ability to make and present a case. The respondent's failure, however, is irrelevant to the tribunal's jurisdiction and is of no consequence for the initial claim. Thus, while the provisions treat the claimant's and respondent's failure differently, the treatment is not unequal. The procedural justice of the approach is also contingent on allowing the parties to justify the failure by showing 'sufficient cause', which is a matter for the tribunal and not the courts.[742] This ensures that the

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[741] Faris Nesheiwat, Ali Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia' (2015) 13 *Santa Clara Journal of International Law* 443, 455.

[742] *Indian Oil Corporation Ltd v Atv Projects India Ltd* (2004) DLT 701 (Delhi HC) <http://indiankanoon.org/doc/1944087/> accessed 30 November 2017.

parties are not prejudiced by circumstances that adequately explain the failure, absolving the party of its responsibility for the failure.

As far as the proceedings themselves are concerned, the precise form of the hearings is not an issue of justice. Article 24 of the Model Law leaves the matter to the parties, with a default power granted to the arbitration tribunal. Provided both parties have an equal opportunity to be heard, natural justice will be served even where the tribunal resolves the dispute without any oral hearings.[743] This is, however, subject to any subsequent request for a hearing, which the tribunal is obliged to honour, unless the parties have exercised their autonomy and agreed otherwise. Should the tribunal refuse such a request, it could be considered a violation of the natural justice right to be heard.[744]

To ensure that the parties have an equal opportunity to present their case, article 24(2) requires that both are given adequate notice of any hearing or meeting. Where a failure to provide sufficient notice prevents a party from adequately presenting its case, this infringes natural justice, undermines the authority of an award and constitutes a breach of both article 24 and article 18.[745] Similarly, article 24(3) imposes an obligation on the tribunal to ensure that relevant documents, including expert reports and evidentiary documents, are equally available to both parties. The point of requiring disclosure, as part of the right to be heard, is to allow the parties the opportunity to take such information and evidence into account and to respond to it. In the context of arbitration, this obligation should be narrowly construed to include only those documents pertinent to the right to be heard. Thus, in *Methanex Motinui*

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[743] *Government of the Republic of the Philippines v Philippine International Air Terminals Co Inc* [2007] 1 SLR (R) 278; [2006] SGHC 206 (HC, Singapore).

[744] Supreme Court, Austria, 30 June 2010, Docket 7 Ob 111/10i.

[745] *Impex Corporation v Elenjikal Aquamarine Exports Ltd* AIR (2008) Ker 199 <http://indiankanoon.org/doc/653638/> accessed 30 November 2017.

Ltd, the New Zealand Court of Appeal held that the duty did not apply to the disclosure of documents to enable a criticism of the tribunal's decision.[746]

Consistent with article 24, default r.28(f) of the SAR provides the tribunal with the discretionary power to determine whether there should be oral hearings, written or oral arguments and the use of documents or other evidence. Unlike article 24 of the Model Law, the Scottish rule imposes no specific obligation to ensure that the parties are given adequate notice of any hearings and to ensure that all documents are communicated to the parties. Although such an obligation is likely to follow from the general duties of natural justice imposed by mandatory r.24 of the SAR and s.1 of the Scottish Act, it might have been better had the duty to provide adequate notification been made explicit.

Article 33 of the SAL 2012 broadly follows article 24 of the Model Law, imposing the natural justice obligation to hold a hearing 'in order to enable either party to explain its case and produce the evidence on which it relies' made explicit by article 33(1). The parties' right to be heard is further protected by article 33(2), which implements article 24(2) of the Model Law and, unlike the Scottish Act, explicitly requires the parties to be given adequate notice of any hearings or substantive meetings of the tribunal. As with the Model Law and the Scottish Act, the form of the hearings is left to the discretion of the tribunal.

Unlike the Model Law and the Scottish Act, article 33(3) of the SAL 2012 requires that any meeting be recorded in minutes, which must be signed by all those attending the hearing. Unless otherwise agreed, a copy of the minutes must be delivered to each party. This provision may be criticised for imposing formality on the proceedings. It opens the door for a technical challenge regarding a failure of the process of producing the minutes. On the other hand, the minutes provide a formal and agreed

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[746] *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454, [129-160] (CA, New Zealand).

record of the hearings that could reduce the likelihood of subsequent legal challenge on the grounds of a procedural irregularity. By ensuring that a contemporaneous record is made, the obligation to produce signed minutes should reduce the risk of any future uncertainty regarding the meeting, which is consistent with the *Sharia's* rejection of *gharar*.

Before moving on, article 26 of the Model Law deserves mentioning. Although this article, which allows the tribunal to appoint experts, is essentially concerned with substantive justice and the efficacy of arbitration, it also engages with natural and procedural justice. The power, which is subject to any contrary agreement of the parties, is entirely discretionary and the appointment of experts is a matter for the tribunal. Any decision to not appoint an expert, or give reasons why an expert has not been appointed, will not be considered prejudicial to the parties' right to be heard.[747] If an expert is appointed, however, and again absent any contrary agreement, the expert may be required, at the request of one of the parties or at the discretion of the tribunal, to attend a hearing allowing the parties to question the expert and 'to present expert witnesses in order to testify on the points at issue'.

Providing the parties with the right to request a hearing, allowing them the opportunity to examine the expert, is an important procedural safeguard. Since expert evidence may prejudice a party's case, the natural justice right to be heard requires that the parties are given an equal opportunity to challenge the expert's testimony and counter it with their own expert witnesses.[748] It is unsurprising then, that under default r.34(2), the Scottish Act ensures a similar protection of the natural justice right to be heard.[749] A comparable protection is also provided by the SAL 2012. Under article

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[747] CLOUT case No 375, Bayerisches Oberstes Landesgericht, Germany, 4 Z Sch 23/99, 15 December 1999 <http://www.dis-arb.de/de/47/datenbanken/rspr/bayoblg-az-4-z-sch-23-99-datum-1999-12-15-id16> accessed 30 November 2017.

[748] *Paklito Investment Limited v Klockner East Asia Limited* [1993] 2 HKLR 39, [52-62] (HC, Hong Kong); *Norbrook Laboratories v Tank* [2006] EWHC 1055 (Comm) [138-139].

[749] *Re Partners of Dallas McMillan* [2015] CSOH 136, [31] per Lord Philip.

36(3), parties must be allowed to examine and comment on the draft expert report. Under article 36(4), either party may request a hearing to allow the expert to be questioned.

4.3.3 The formal justice principle of accessibility

Accessibility was previously identified as both a principle of formal justice and the rule of law. It demands that arbitration should be relatively straightforward to use. This requires internally consistent rules that are clear, easy to understand, and sufficiently well-defined to allow the parties to reasonably predict their application in practice. In general, the Model Law and the Scottish Act have been drafted in clear language that is readily understood. While the SAL 2012 varies the wording of the Model Law it is also generally clear and intelligible. Furthermore, all three instruments are readily available in English, which is important given the global nature of English as a language,[750] and its prevalence as a common language in international commerce.[751]

In terms of predictability the approach of establishing a broad general principle that influences the application of the more specific rues is useful. All three of the instruments do this through the requirement for equal treatment, which is given substance by the natural justice requirement that all parties are given a fair opportunity to be heard. This is then supplemented by more detailed provisions setting out specific rules such as those regarding adequate notice, statements of claim and defence, and the opportunity to examine expert evidence and question expert witnesses.

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[750] David Crystal, *English as a global language* (2nd edn, Cambridge University Press 2003); Anne Johnson, 'The Rise of English: The Language of Globalization in China and the European Union' (2009) 22 *Macalester International* 131; Jacques Melitz, 'English as a global language' (2015) Heriot-Watt University Economics Discussion Papers No 2015-05.

[751] Jan Fidrmuc, Jarko Fidrmuc, 'Foreign Languages and Trade' (2009) Brunel University Economics and Finance Working Paper No 09-14, 25.

The Scottish Act provides the most accessible solution through its comprehensive set of arbitration rules, which are 'designed to be user-friendly'.[752] Under s.7, the SAR 'govern every arbitration seated in Scotland (unless, in the case of a default rule, the parties otherwise agree)'. The rules are set out in schedule 1, which may be used as a stand-alone procedural framework for the arbitration proceedings. This has the advantages of clarity, predictability and accessibility,[753] which are important requirements for any formally just system. It also has the advantages of convenience and efficiency. The parties simply need to agree that Scotland will be the seat and the rules will automatically be engaged. This obviates the need for any further time-consuming negotiation and ensures that there is a complete set of rules for the proceedings.[754]

While the SAL 2012 was inspired by and is based on the Model Law,[755] the two instruments are not identical. This is because the SAL 2012 must account for the specific national context of arbitration and the relevance of *Sharia* law. In adapting the Model Law, the clarity of its provisions is sometimes lost. For example, article 29, which deals with the language of the proceedings states that: 'Arbitration shall be conducted in ... Arabic ... unless the arbitral tribunal or both parties agree on any other language'. The problem with this is that, while the Model Law is clear that the tribunal has the power to determine the language only where the parties have not done so, article 29 appears to allow the power to be exercised by either the tribunal or the parties. Unlike article 28 of the SAL 2012, which clearly gives the parties priority to

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[752] David Wilson, 'The Resurgence of Scotland as a Force in International Arbitration: The Arbitration (Scotland) Act 2010' (2010) 27 *Journal of International Arbitration* 679, 683

[753] See the explanation provided by Jim Mather SMP (Minister for Enterprise, Energy and Tourism), *Scottish Parliament Official Report*, 25 June 2009, col 18955. See also: William W Park, 'Arbitration's Protean Nature: The Value Of Rules And The Risks Of Discretion' (2004) 19 *Mealey's International Arbitration Report* 1, 3*ff.*

[754] Hong-Lin Yu, 'A Departure From The UNCITRAL Model Law - The Arbitration (Scotland) Act 2010) And Some Related Issues' (2010) 3 *Contemporary Asia Arbitration Journal* 283, 293.

[755] Jean-Pierre Harb, Alexander G Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 *Journal of International Arbitration* 113, 124; Faris Nesheiwat, Ali Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and its Effect on Arbitration in Saudi Arabia' (2015) 13 *Santa Clara Journal of International Law* 443, 444-445.

agree on the arbitration forum, article 29 appears to afford equal priority to the parties and the tribunal. This makes it difficult to predict what should happen where the tribunal opts, for example, to conduct the proceedings in Arabic while the parties agree that the language should be English. This is unfortunate since it confuses what would otherwise be a straightforward issue and it could easily have been avoided by taking a similar approach to the Scottish Act and drafting simple rules, clearly labelled as default or mandatory.

The relevance of *Sharia* is made clear in article 25 of the SAL 2012, which allows the parties or tribunal to use any rules of procedure providing they are consistent with *Sharia*. This is helpful, but does nothing to explicate the limits imposed by *Sharia*, which makes the law less accessible to those unfamiliar with *Sharia*. A more detailed approach would have been helpful, setting out the specific constraints of *Sharia* that apply to the procedural rules. For example, under the SAR, r.50 allows interest to be awarded, but this would be inconsistent with the *Sharia's* prohibition of *riba*. Given the importance of *Sharia* in Saudi, and its relevance to the SAL 2012, a more complete set of rules following the Scottish approach would have been helpful.

4.3.4 Balancing justice and autonomy

In drafting rules of procedure, the key tension is between ensuring justice and respecting party autonomy. The whole point of arbitration is to fairly and effectively resolve a dispute in a way that serves the parties' needs better than other forms of dispute resolution, such as litigation. Arbitration is attractive because it is flexible, allowing a greater respect for party autonomy than is possible within the more rigid system of litigation. In the 2015 survey of International Arbitration, respondents ranked flexibility as the third most valuable characteristic of arbitration, behind the enforceability of awards and the ability to avoid specific national legal systems.[756] As discussed previously, the procedural flexibility that respects party autonomy must be

[756] School of International Arbitration Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015), 6.

balanced against the parties', and the state's, interest in ensuring a just process. Furthermore, that balance of interests must be achieved within the context of cost-effectiveness and efficiency.

The clearest evidence of the context-sensitive balance between autonomy and justice may be found in s.1 of the Scottish Act, which provides for the founding principles. While, s.1(a) requires the arbitration process to be both cost-effective and just, s.1(b) states: 'that parties should be free to agree how to resolve disputes subject only to such safeguards as are necessary in the public interest'. Neither the Model Law nor the SAL 2012 make the balance of principles so explicit. Both provide for the overarching principles of equality and *audi alterem partem*. There is, however, no equivalent reference to the principle of party autonomy. Rather, the flexibility necessary to respect party autonomy is provided for within the text of individual articles that establish a default rule, which may be varied or disapplied by the parties' agreement.

The balance between justice and autonomy is evident in the distinction between mandatory and default rules. An approach that excluded mandatory rules would serve autonomy by maximising flexibility. It would, however, fail to recognise the possibility of a power imbalance between the parties, which may allow a stronger party to negotiate an agreement prejudicing a weaker party. Mandatory rules can ensure that there are sufficient procedural safeguards to constrain the effect of any such power imbalance. Those procedural safeguards may also be valuable to minimise the impact of any bias in the management of the arbitration process by the tribunal, whether that bias arises from partiality or substandard conduct.

While both the Model Law and the SAL 2012 rely on mandatory and default rules, the Scottish Act provides the most complete scheme through a statutory set of rules. The flexibility necessary to respect party autonomy is provided for by the inclusion of default rules under s.9 of the Act. This provides that the default rules apply unless the parties agree to disapply the rule. As default rather than mandatory rules, the

parties are free to opt out of, or modify, any, or all, of them through the arbitration agreement or any other form or means of agreement.[757]

While default rules will apply in the absence of any contrary agreement,[758] maximum flexibility, and hence autonomy, is ensured by allowing that these rules may be modified or disapplied at any time, even after the arbitration proceedings have begun.[759] A potential problem with default rules that may be disapplied, is the risk of inconsistency. This is reduced by s.9(4), which provides that any inconsistencies should be resolved in favour of the parties' agreement. This is achieved by treating them as an implicit agreement that the default rule was to be modified or disapplied. While this may not always reflect what the parties had intended, it does, at least have the significant benefit of providing a clear and definite rule that should enhance the predictability and efficiency of the arbitration process.

There are 36 mandatory rules that, under s.8, 'cannot be modified or disapplied … in relation to arbitration seated in Scotland'. According to the Explanatory Notes:

> The mandatory rules take precedence over any agreement between the parties which conflicts with those rules. If an arbitration is not conducted in accordance with the rules … the tribunal or arbitrator may … be open to removal or dismissal … and an award may be liable to challenge.[760]

The point of the mandatory rules is to 'facilitate' and ensure a procedurally just arbitration process.[761] To 'preserve the principle of party autonomy', however, the

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[757] Scottish Act, s 9(2), (3).

[758] *Arbitration Application (No 3 0f 2011)* [2011] CSOH 164, [4].

[759] Scottish Act, s 9(3)(b).

[760] Explanatory Notes to the Arbitration (Scotland) Act 2010.

[761] Arbitration (Scotland) Bill: Policy Memorandum (2009), para 78.

mandatory rules were 'kept to a minimum'.[762] This is a reasonable approach that attempts to balance the two core principles of justice and party autonomy. As discussed previously, this inevitably requires a compromise where there is tension between the principles. The question is how well the mandatory/default rules approach does this, which may be determined by identifying mandatory rules that should be default and default rules that should be mandatory.

A good example of a mandatory rule that imposes a justice-based constraint on the exercise of party autonomy is the obligation to ensure that the parties are treated equally, with a full, or at least fair, opportunity to present their case. As discussed above, this mandatory rule is provided for by article 18 of the Model Law and by article 27 of the SAL 2012. The wording of article 27 reflects the mandatory nature of the Model Law provision by issuing the imperative that the parties 'shall be treated' equally. This language is supported by the absence of any clause allowing the parties the discretion to vary or disapply the provision. Similarly, the Scottish Act uses mandatory r.24 to impose a general duty of justice on the tribunal. The provision in the Scottish Act, however, goes further than those found in the Model Law or the SAL 2012.

Reflecting the commercial interest in efficiency and cost-effectiveness, r.24 also requires the tribunal to conduct the arbitration 'without unnecessary delay, and ... expense'. Mandatory r.25 places a similar obligation on the parties. According to a policy memorandum, this provision was 'intended to make it clear to parties that ... deliberate delaying tactics by one or other of the parties' are unacceptable and may be considered when calculating liability for expenses.[763] As a mandatory rule imposing a good faith duty not to employ delaying tactics, r.25 appears to limit party autonomy

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[762] Jim Mather MSP, 'Arbitration (Scotland) Bill: Stage 1' Economy, Energy and tourism Committee, Session 3, 3 June 2009, col 2237.

[763] Scottish Parliament, *Arbitration (Scotland) Bill Policy Memorandum* (2009), paras 147-148 <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16034.aspx> accessed 30 November 2017.

for the benefit of efficiency. Delaying tactics, however, may be used by a party with deeper pockets, to exploit the other party's lack of financial resources. This creates an inequality that may allow the stronger party to achieve a better outcome than would otherwise be expected. As such, the mandatory nature of the provision is concerned with precluding unjust outcomes resulting from the manipulation of the arbitration process. While the SAL 2012 imposes an obligation, under article 30, to submit the statements of claim and defence timeously, there is no such general obligation on either the parties or the tribunal. From a justice perspective, such a general obligation serves a useful purpose and the SAL 2012 should accordingly be amended.

4.3.4.1 The submission of statements, hearings and confidentiality

Under the Model Law, a further mandatory rule is the obligation on the parties under article 23(1) to submit statements of claim and defence.[764] This rule does, however, allow the parties to determine the necessary elements of the statements, with the tribunal afforded the role of ensuring that the parties have the opportunity to amend any deficiencies.[765] The SAL 2012 similarly mandates, under article 30, that the parties must submit statements of claim and defence. Like the Model Law, some discretion is given to the parties regarding the elements that may be included. Article 30, however, also requires that the statement of claim include the elements specified in article 30(1). This is a greater restriction on autonomy than under the Model Law, but improves the efficiency of the arbitration process by reducing the risk of a deficient statement. As discussed previously, the Scottish Act provides for the statements under default r.28(2)(b). While this respects party autonomy, the approach under the Model Law and the SAL 2012 provides greater certainty and, since the statements are relevant both to the tribunal's jurisdiction and to each party's ability to respond the other party's case, better serves the interests of justice and efficiency.

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[764] Bayerisches Oberstes Landesgericht, Germany, 4 Z Sch 02/99, 29 September 1999 <http://www.dis-arb.de/de/47/datenbanken/rspr/bayoblg-az-4-z-sch-02-99-datum-1999-09-29-id18> accessed 30 November 2017.

[765] *Ng Chin Siau v How Kim Chuan* [2007] 2 SLR 789; [2007] SGHC 31, [26] (HC, Singapore).

Under article 24, the Model Law also provides mandatory rules that impose a duty on the tribunal to provide adequate notice of hearings and to ensure both parties are provided with all relevant documents and information. The SAL 2012 imposes similar obligations under articles 31 and 33. Although mandatory, these rules impose a duty on the tribunal rather than the parties. They serve both the interests of justice and party autonomy, ensuring that the parties have the necessary information and opportunity to present their case to the tribunal.

Under the Scottish Act, these issues are left to the discretion of the tribunal under the default r.28. This respects both party autonomy and the autonomy of arbitration proceedings, affording the tribunal sufficient power to ensure the efficiency of the proceedings regardless of any deficiencies in the parties' agreement.[766] There is no explicit duty to give the parties notice of hearings, but this is implicit to the general duty imposed by mandatory r.28. While discretionary, the power afforded the tribunal under r.28(2)(c) to determine whether documents should be disclosed to the parties remains subject to the general duties of natural justice imposed by the founding principles and mandatory r.24. This provides greater flexibility, but at the expense of certainty and the possibility that a party may challenge the rationality of any decision to exercise that discretion. Given that, as mandatory rules under the Model Law and the SAL 2012, the duties are imposed on the tribunal rather than the parties, there seems to be little benefit to be gained from the discretionary approach taken by the Scottish Act in this regard.

Before turning to consider the laws governing the arbitration tribunal, it is worth noting one further distinction between the approach under the Scottish Act and the approach taken by the Model Law and the SAL 2012. Neither the Model Law nor the

[766] Scottish Parliament, *Arbitration (Scotland) Bill Policy Memorandum* (2009), paras 159-160 <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16034.aspx> accessed 30 November 2017.

SAL 2012 make any provision for a duty of confidentiality. The Scottish Act does, however, provide under default r.26 a 'robust confidentiality provision'.[767]

Confidentiality is often in the commercial interests of the parties, and a norm of ICA.[768] Providing a default rule serves those interests and respects the principle of party autonomy. By explicating the duty and the exceptions, the Scottish Act balances the private autonomy-based interests in confidentiality and the public interest in the disclosure required to ensure justice is transparent. This approach provides both the certainty and clarity required by formal justice and, given that the duty is not uniformly protected in all jurisdictions,[769] it is perhaps unfortunate that the SAL 2012 is silent on the question.

The reason for the different approach taken by the Scottish legislation may be found in the intention to provide a comprehensive framework of rules for arbitration. The Model Law, by contrast, aims only to provide a skeleton for national legislation. Given the complexity of the issue and lack of a uniform across the various national jurisdiction, it is understandable that the Model Law made no attempt to deal with confidentiality. In following the Model Law, the SAL 2012 has missed the opportunity for clarity and certainty regarding the confidentiality of arbitration proceedings. It would have been better had Saudi followed the Scottish lead by taking the opportunity to set down clear guidance on the extent of any duty of confidence and the consequences for breaching that duty.

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[767] Derek P Auchie, Richard Farndale, Chris Mackay, Coral Riddell, *The Scottish Arbitration Survey: Report No 1* (2015), 9.2.2.

[768] Hong-Lin Yu, 'A Departure From The UNCITRAL Model Law - The Arbitration (Scotland) Act 2010) And Some Related Issues' (2010) 3 *Contemporary Asia Arbitration Journal* 283, 299.

[769] International Law Association, 'Confidentiality in International Commercial Arbitration', (2010) 74 International Law Association Reports of Conferences 186, 189-190 (Report of The Hague Conference (2010)).

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4.4 The Law Governing the Arbitration Tribunal

Apart from their relevance to the procedural rules, natural and procedural justice are also relevant to the rules governing the arbitration tribunal. The tribunal has two functions. First, it manages the arbitration proceedings and is responsible for ensuring that they are cost-effective, efficient, fair and compliant with the rules. Second, it decides the case and makes the award to resolve the parties' dispute. In fulfilling these functions, the tribunal performs a quasi-judicial role,[770] which imposes an obligation to make a just and reasoned decision and highlights the relevance of the natural justice principle of *nemo index in causa sua* (nobody should be a judge in his/her own cause).

In addition to that natural justice principle, the law governing the arbitration tribunal must also be informed by the principle of party autonomy. It is the consent of the parties, and the contractual relationship between the two parties and each of the arbitrators,[771] that provides the arbitrators with the jurisdictional authority to manage proceedings and determine the dispute. This affords the arbitrators a significant power over the parties and the law must ensure that this power is exercised justly and appropriately, within the limits defined by the arbitration agreement.[772]

Regardless of which party is responsible for appointing an arbitrator, that arbitrator's power and authority derives from the consent of all parties. As the French *Cour de Cassation* explained, 'even when initiated by one party', the appointment of an arbitrator: 'which forms an important part of the arbitration agreement, results from the common intention of the parties'.[773] The implication, which is consistent with a quasi-judicial role, is that the arbitrators must be impartial between the parties,[774] and

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[770] *Re Partners of Dallas McMillan* [2015] CSOH 136.

[771] *Jivraj v Hashwani* [2011] UKSC 40, [23].

[772] Piero Bernardini, 'The Role of the International Arbitrator' (2004) 20 *Arbitration International* 113, 117.

[773] *Consorts Ury v SA des Galeries Lafayette Cass* 2e civ, 13 April 1972.

[774] Judge Dominique Hascher, 'Independence and Impartiality of Arbitrators: 3 Issues' (2012) 27 *American University International Law Review* 789, 791,

should be sufficiently independent of their interests to ensure that there is no good reason to doubt their lack of bias. As Lord Clarke explained in the English case of *Jivraj v Hashani*:

> The arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the partisan interests of the parties ... He is in effect a "quasi-judicial adjudicator".[775]

Arbitrators, then, should not be afforded the 'special status of a "non-neutral"'.[776] Indeed, the arbitrator's independence and impartiality 'underpin the entire arbitral process' and are necessary to ensure a just resolution of the dispute.[777] This impartiality, which reflects the requirements of the natural justice principle *nemo index in causa sua*, helps to preserve the legitimacy required to maintain the confidence of both nation states and the world of commerce in arbitration as a private system of dispute resolution.[778] Although in practice the parties may expect the arbitrator to be predisposed towards the appointing party's interests,[779] that predisposition should be constrained by their natural justice duty. As Franck notes, ICA is expected to avoid partisan decision-making and provide a 'fair process that justifies the expenditure of significant legal fees on dispute resolution in pursuit of broader commercial objectives'.[780] Thus, the rules governing the arbitration tribunal must provide a balance between party autonomy and justice that is both efficient and cost-effective.

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[775] *Juvraj v Hashwani* [2011] UKSC 40, [41].

[776] Emmanuelle Gaillard, John Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer 1999), 462; Neil Andrews, *Arbitration and Contract Law: Common Law Perspectives* (Springer 2016), 106.

[777] Hong-Lin Yu, Laurence Shore, 'Independence, Impartiality, and Immunity of Arbtitrators - US and English Perspectives ' (2003) 52 *International and Comparative Law Quarterly* 935, 936.

[778] Susan D Franck, 'The Role of International Arbitrators' (2006) 12 *ILSA Journal of International & Comparative Law* 499, 521; Shimon Shetreet, 'The Duties of Fairness and Impartiality in Non-Judicial Justice' (2013) 21 *Asia Pacific Law Review* 197, 212.

[779] Martin Hunter, 'Ethics of the International Arbitrator, (1987) 53 *Arbitration* 219, 223.

[780] Susan D Franck, 'The Role of International Arbitrators' (2006) 12 *ILSA Journal of International & Comparative Law* 499, 503-504.

4.4.1 Party autonomy and the appointment of arbitrators

The importance of arbitrator selection is reflected in Hummer's observation that: 'An old axiom … is that arbitrations are won or lost in the panel selection process'.[781] As Lew et al note: 'the quality of arbitration proceedings depends to a large extent on the quality and skill of the arbitrators chosen'.[782] This highlights the parties' interest in selecting the arbitrators, which is protected by the principle of party autonomy. This principle requires that the parties should be free to both determine the size of the tribunal and choose the individual arbitrators that will adjudicate the dispute. It is reflected in articles 10 and 11 of the Model Law.

Article 10 of the Model Law allows the parties complete freedom to decide on the number of arbitrators,[783] with a default rule providing for three. Similarly, article 11 provides a default process, but allows the parties the freedom to agree on their own procedure for appointing the arbitrators. This approach prioritises the principle of autonomy while ensuring that the efficiency of the arbitration process is not unduly compromised by a failure of the parties to agree on the procedure.[784] Consistent with the formal justice principle of equality, article 11(3) ensures that both parties have the same opportunity to appoint or agree to the arbitrators. Thus, where there are to be three arbitrators, then each party chooses one of the arbitrators, with the third arbitrator chosen by the two party-appointed arbitrators. Where there is to be a sole arbitrator, the selection must be agreed by both parties, with the court, or equivalent body, acting as an impartial selector where the parties are unable to agree. Under article 11(4), the court takes on a similar role where the party-agreed appointment procedure fails.

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[781] Paul M Hummer, 'The Law of Arbitration Selection' (2007) 14 *ARIAS US Quarterly* 2.

[782] Julian D M Lew, Loukas A Mistelis, Stefan M. Kroll, *Comparative International Commercial Arbitration* (Kluwer, 2003), 231.

[783] *MMTC Ltd v Sterlite Industries (India) Ltd* (1996) 6 SCC 716 (India); *Electra Air Conditioning BV v Seeley International Pty Ltd* [2008] FCAFC 169, [35] (Australia).

[784] Tatsuya Nakamura, 'Appointment of arbitrators according to the UNCITRAL Model Law on International Commercial Arbitration' (2005) 8 *International Arbitration Law Review* 179.

The provisions of article 11(4), which only comes into operation where the appointment procedure fails, are mandatory, imposing a limit on party autonomy in the interests of ensuring the efficiency and the effectiveness of the arbitration process.[785] Rather than supplanting party autonomy, the court's role is essentially to provide assistance in minimising any delays in the arbitration process.[786] Indeed, in *Pacific International Lines (Pte) Ltd v Tsinlien Metals and Minerals Co (HK) Ltd*, Kaplan J went so far as to allow the parties an additional 7 days to make the selection before making the decision on their behalf.[787] The continuing importance of party autonomy was also apparent in the Kenyan case of *Mvungo v Rosiello*, in which the court held that its selection of an arbitrator should be informed by 'input from the parties', who should suggest suitable candidates for selection.[788]

Under the Scottish Act, the SAR similarly allow the parties the freedom, under default r.2, to appoint the members of the tribunal or specify how the tribunal should be appointed. This is supported by default r.5 and r.6, which provide for the appointment procedure where the parties do not include the arrangements in their agreement. Like the Model Law, the SAR specifies a default number of arbitrators, which avoids the uncertainty of the approach under the SAL 2012 (see below). Unlike the Model Law, however, the default is a sole arbitrator, rather than a panel of three. This has the advantage of minimising the cost of the default procedure, which seems sensible given that the parties may specify the number of arbitrators where they prefer the dispute not to be resolved by a single adjudicator.

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[785] UNCITRAL, *Analytical commentary on draft text of a model law on international commercial arbitration*, A/CN.9/264 (UN 1985), para 3 <http://www.uncitral.org/uncitral/en/commission/sessions/18th.html> accessed 30 November 2017.

[786] *Montpelier Reinsurance Ltd v Manufacturers Property & Casualty Ltd* [2008] SC (Bda) 27 Com, [30], [50] (Bermuda).

[787] *Pacific International Lines (Pte) Ltd v Tsinlien Metals and Minerals Co (HK) Ltd* [1993] 2 HKLR 249 (Hong Kong).

[788] *Mvungo v Rosiello* [2006] eKLR (High Court, Kenya) <http://kenyalaw.org/CaseSearch/view_preview1.php?link=45490335730361202257126> accessed 30 November 2017.

Like the SAL 2012 (see below), the SAR require that the arbitrator be legally competent, but does not impose any requirements that the arbitrator be of good character or legally qualified. Similarly, the SAR impose no restrictions on the number of arbitrators required for a valid tribunal. Thus, the parties are free to select an even number of arbitrators. Mandatory r.3, however, requires that only individuals may be appointed to act as an arbitrator. This precludes the possibility that a party may appoint a legal entity rather than a natural person as arbitrator, emphasising 'the "personal nature" of the arbitrator's remit'.[789]

As with the Model Law, the SAR specify the procedure where the tribunal selection process breaks down. Rule 7 is a mandatory rule, which means that the parties are not free to opt-out of the rule. Mandatory rules generally limit the freedom of the parties, which appears to infringe the principle of party autonomy. However, where a mandatory rule serves to correct a defect in the parties' agreed procedure, then it supports party autonomy in the context of the obligations arising out of the relationship created by the parties' agreement.[790]

While this is generally consistent with the approach taken by the Model Law, the SAR provide for an alternative mechanism to correct a defective selection process. Rather than requiring an application to the court, r.7 allows the parties to refer the issue to an arbitral appointments referee. Under s.24 of the Scottish Act, an arbitral appointments referee may be authorised by ministerial order and should be persons with relevant experience of arbitral appointments as well as the capability to provide training and disciplinary procedures 'to ensure that arbitrators conduct themselves properly'.

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[789] Trevor Cook, Alejandro I Garcia, *International Intellectual Property Arbitration* (Kluwer 2010), 150.

[790] Ian R Macneil, 'Relational Contract: what we do and do not know' (1985) *Wisconsin Law Review* 483.

The arbitral appointments referee is an innovative role that serves to facilitate both the efficiency and cost-effectiveness of arbitration,[791] since it is likely to be quicker and cheaper to use an experienced referee than to apply to the court for assistance. Indeed, Dundas notes that while the courts make '5-10 appointments a year', the type of professional bodies that have been accredited as arbitral appointment referees make thousands of such appointments.[792] Furthermore, their role in ensuring arbitrators conduct themselves properly should reduce the risk that there will be breaches of natural or procedural justice in the arbitration proceedings. Finally, they also enhance party autonomy by providing parties with the choice of using an arbitral appointments referee or applying for the court's assistance. Thus, this 'remarkable feature of the Act'[793] should further not just efficiency and cost-effectiveness, but also party autonomy and justice. It is a feature that would only enhance the SAL 2012, which should be amended to include such a facility.

Turning to the SAL 2012, this also respects party autonomy by allowing, under article 15, that the 'parties to arbitration may agree to the appointment of arbitrators', with no explicit restriction on gender, religion or nationality.[794] This is supported by a similar default procedure that serves to avoid any unnecessary delay caused by the failure of the parties to agree on an appointment procedure. Although similar to the Model Law default, the procedure is streamlined under the SAL 2012, minimising any delays. Under the Model Law, the default procedure allows thirty days for the appointment of the third arbitrator. The SAL 2012 halves this time-period, allowing only fifteen days for the selection.

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[791] Hew R Dundas, 'The Arbitration (Scotland) Act 2010: converting vision into reality' (2010) 76 *Arbitration* 2, 12.

[792] Hew R Dundas, 'Court appointment of arbitrators and leave to appeal: Itochu v Blumenthal' (2012) 78 *Arbitration* 381, 385.

[793] Fraser Davidson, 'The Arbitration (Scotland) Act 2010: the way forward or a few missteps?' (2011) 1 *Journal of Business Law* 43, 51.

[794] Abdulrahman Yahya Baamir, 'The new Saudi Arbitration Act: evaluation of the theory and practice' (2012) 15 *International Arbitration Law Review* 219, 223.

Where party autonomy is frustrated by the failure of the agreed procedure, then, like article 11(4) of the Model Law, article 15(2) of the SAL 2012 allows the court jurisdiction to respond to a request from one of the parties to complete the selection of the tribunal. Like the Model Law, the court's decision, under article 15(4), is not subject to appeal. The SAL 2012, however, goes further than the Model Law by imposing a thirty-day time limit on the court, which should limit the delay caused by the breakdown in the selection process. Furthermore, the SAL 2012 explicitly provides for a greater respect for party autonomy by requiring, under article 15(3) that the 'court shall ensure that the arbitrator appointed ... satisfies the conditions provided for in the mutual agreement of the parties'. This goes further than article 11(5) of the Model Law, which simply requires the court to have 'due regard to any qualifications required of the arbitrator by the agreement of the parties'. Given, however, the pro-autonomy approach of the courts when giving effect to article 11(5) of the Model Law, the difference between the Model Law and the SAL 2012 may not be of any practical consequence. However, following the approach under the Scottish Act, the SAL 2012 should be amended to provide for the appointment of arbitration referees, which would serve the interests of both autonomy and efficiency.

While the Model Law and the SAR allow the parties complete freedom to determine the number of arbitrators and the appointment procedure, the SAL 2012 restricts that freedom. Under article 13, the tribunal must comprise an odd number of arbitrators. This is presumably to avoid the possibility that an even number of arbitrators will be unable to reach a majority decision.[795] While this is a limit on party autonomy, any infringement is offset by the goal of facilitating the effectiveness and efficiency of the arbitration process. It should also be noted that the SAL 2012 is not alone in precluding a tribunal with an even number of arbitrators. For example, a similar provision is found in s.10(1) of the Indian Arbitration and Conciliation Act 1996, which remained un-amended by the Arbitration and Conciliation (Amendment) Act 2015. It should further be noted that article 13 does not specify a default number of

[795] Ahmed A Altawyan, 'Overview of Arbitral Tribunal Under the Saudi Arbitration Law: A Comparison with International Rules' (2017) 12 *Journal of Strategic and International Studies* 88.

arbitrators. This creates uncertainty regarding the consequences of the parties failing to specify the number of arbitrators in their agreement. Article 13 could be interpreted as implying that the default number is one. Alternatively, it could be understood as providing that a failure to agree on the number of arbitrators renders arbitration null and void. Such uncertainty could have been avoided by following the Model Law and Scottish Act and providing for a default number of arbitrators.

The freedom of the parties to choose the arbitrators is limited by article 14, which imposes three conditions. The first requires the arbitrator to be legally competent. While the principle of autonomy would, in theory, allow the parties to choose a legally incompetent arbitrator, justice requires that any adjudicator is competent to fulfil his or her role. While legal competence does not guarantee the competency to adjudicate, it provides a threshold requirement that serves the formal justice aim of certainty. While this provision seems innocuous on the surface, it has been suggested that it could be used to preclude the appointment of female arbitrators, who may not be considered legally competent.[796] However, as discussed in section 3.3.3 of this thesis, women are training in Saudi to be arbitrators and an administrative Court of Appeal recently accepted the appointment of a female arbitrator without objection.

The second restriction is that the arbitrator must 'be of good conduct'. This is of far more practical importance than the first restriction. While the first restriction is clear, the concept of good conduct is vague and open to interpretation. If it had been limited to precluding the appointment of a person convicted of serious criminal offences, such as fraud, then the restriction would be a reasonable justice-based limit on party autonomy. As it stands, it provides too much leeway for the appointment of an arbitrator to be challenged, despite any presumption in favour of the arbitrator.[797] It

[796] Faris Nesheiwat, Ali Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and its Effect on Arbitration in Saudi Arabia' (2015) 13 *Santa Clara Journal of International Law* 443, 451.

[797] Mohamed Khairi Al-Wakeel, *Comments on the New Saudi Arbitration Law* (King Fahd National Library, 2014/1435H), 48.

may, however, be argued, that this restriction is required to ensure that the legal rules are consistent with the *Sharia*. In the Holy Qur'an it states that: 'Surely Allah commands you to make over trust to those worthy of them, and that when you judge between people, you judge with justice'.[798] The requirement to trust those that are 'worthy' to act in a judicial, or quasi-judicial, role suggests that judges and arbitrators must be of good character or 'conduct'. The difficulty is to provide a legal rule that is consistent with the need for a 'worthy' person but is not overly vague. This will be discussed further in chapter six.

The final restriction is that at least one of the arbitrators must 'be a holder of a university degree in *Shari'a* or legal sciences'. While this is a significant limit on the autonomy of the parties, the impact of the requirement is diminished by the caveat that, for tribunals of three or more arbitrators, only the chairperson must be so qualified. Furthermore, given that the tribunal must both identify and apply applicable law, it is reasonable to require at least one of the arbitrators to have a legal qualification.[799]

4.4.2 Natural justice and the tribunal

As discussed above, the natural justice principle of *nemo index in causa sua* requires that the arbitrators must be independent and impartial. The elements of independence and impartiality, which are implicit to the requirement that the parties be treated equally, provides a ground for challenging the appointment of an arbitrator under article 12(2) of the Model Law.[800] The fundamental nature of this natural justice principle was emphasised by the Quebec Court of Appeal. In *Desbois v AC Davie Industries*, it was held that, as 'a judicial act [an] essential quality of [arbitration] is

[798] Chapter 4, verse 58.

[799] Won L Kidane, *The Culture of International Arbitration* (Oxford University Press 2017), 286.

[800] A challenge may also be brought where the arbitrator lacks the agreed qualifications.

the independence and impartiality of the [arbitrators]'.[801] Because of this, an agreement for one of the parties to the contract to act as arbitrator was null and void.

Article 12(1) of the Model Law imposes an ongoing obligation on the arbitrator to 'disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence'. Importantly, and reflecting the need to respect party autonomy and allow the parties to assess the appointment,[802] this duty is wider than any concomitant duty on the arbitrator to withdraw from the tribunal because of the possibility of impartiality or lack of independence. As Wong J explained:

> A failure to disclose, of itself … may give rise to a reasonable apprehension of bias … A failure to disclose, no matter how unwitting, can undermine public confidence in the integrity of, and the administration of justice by, the judicial officer or the tribunal concerned ... The facts to be disclosed are not confined to those warranting or perceiving to be warranting disqualification but those that *might* found or warrant a *bona fide* application for disqualification.[803]

This duty to disclose is to be determined by an objective assessment of the facts relevant to the impartiality and independence of the arbitrator.[804]

Where doubts exist regarding the arbitrator's impartiality or independence, article 12(2) allows the parties to challenge the appointment. Where a party has appointed an arbitrator, or participated in the appointment, then the challenge is only permitted where the party becomes aware of the reasons supporting the challenge after the

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[801] *Desbois v AC Davie Industries* [1990] CanLII 3619 (Quebec CA, Canada).

[802] Judge Dominique Hascher, 'Independence and Impartiality of Arbitrators: 3 Issues' (2012) 27 *American University International Law Review* 789, 795

[803] *Jung Science Information Technology Co Ltd v ZTE Corporation* [2008] HKCFI 606, [57-58].

[804] CLOUT case No 665, Oberlandesgericht Naumburg, Germany, 10 Sch 03/01, 19 December 2001 <http://www.dis-arb.de/de/47/datenbanken/rspr/olg-naumburg-az-10-schh-03-01-datum-2001-12-19-id165> accessed 30 November 2017.

appointment has been made. Importantly, evidence of actual bias is not essential, as the challenge procedure may be initiated where there are 'justifiable doubts' regarding the arbitrator's impartiality or independence.[805] In other words, article 12(2) provides a pre-emptive measure for preserving natural justice. Furthermore, the standard of 'justifiable doubts' should be determined by reference to the viewpoint of an 'objective, fair-minded and informed observer'.[806] Using such an objective standard is consistent with the justice-based principles of equality and impartiality, since it sets the bar at a level that allows a meaningful challenge of the arbitrator's impartiality or independence and avoids the bias of a subjective viewpoint.[807] It also limits the risk that the challenge process will be used as a self-serving tactic. The standard may, however, be criticised for prioritising the state's interest in justice over the party's more subjective interest in the perception of a just process.

The challenge procedure itself is provided for by article 13, which allows the parties to agree on the procedure. In one German case, the court held that the parties were free to waive the challenge procedure entirely.[808] This appears to prioritise party autonomy and efficiency over justice and effectiveness, but it does not preclude the request for a court to determine the matter. As the parties' freedom to agree on a procedure under article 13(1) is 'subject to the provisions of paragraph (3) of this article', the agreement to waive the procedure will also be so subject. Thus, the interests of justice are preserved, while affording respect to party autonomy.

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[805] Kammergericht Berlin, Germany, 28 Sch 24/99, 22 March 2000 <http://www.dis-arb.de/de/47/datenbanken/rspr/kg-berlin-az-28-sch-24-99-datum-2000-03-22-id118> accessed 30 November 2017.

[806] *Jung Science Information Technology Co Ltd v ZTE Corporation* [2008] HKCFI 606, [52]; CLOUT case No 665, Oberlandesgericht Naumburg, Germany, 10 SchH 03/01, 19 December 2001 <http://www.dis-arb.de/de/47/datenbanken/rspr/olg-naumburg-az-10-schh-03-01-datum-2001-12-19-id165> accessed 30 November 2017.

[807] Chiara Giorgetti, 'Who Decides Who Decides in International Investment Arbitration' (2014) 35 *University of Pennsylvania Journal of International Law* 431, 478-480

[808] Hanseatisches Oberlandesgericht Hamburg, Germany, 9 Sch 01/05, 12 July 2005 <http://www.dis-arb.de/de/47/datenbanken/rspr/hanseat-olg-hamburg-az-9-schh-01-05-datum-2005-07-12-id1170> accessed 30 November 2017.

Should the parties not make any arrangements for the challenge procedure, then article 13(2) provides a default procedure that facilitates the efficiency and effectiveness of the arbitration process. Article 13(2) requires a challenge to be made within fifteen days of actual knowledge of the reasons for the challenge. These reasons must be submitted in writing to the tribunal, which will decide on the challenge unless the arbitrator withdraws or the other party agrees to the challenge. Under article 13(3), an unsuccessful challenger may apply to the court for determination of the issue.

The provisions for challenging the arbitrator's appointment provide a reasonable balance between party autonomy, natural justice and efficiency. This balance is reflected in the parties' power to determine the procedure for making a challenge, which is subject to restrictions that ensure the arbitration process is not unduly delayed.[809] Thus, there is a reasonable time limit of fifteen days for making the initial challenge. This allows the party time to prepare a challenge while reducing the risk that it will be used as a delaying tactic. Furthermore, while the party making an unsuccessful challenge may make an application to the court, there is no further appeal from the court's decision. This allows the party to have the matter decided by a judge sitting outside the arbitration process, but prevents the challenge from unduly obstructing the process by limiting the party's freedom to appeal that decision.[810] The efficiency of the process is further protected by article 13(3), which allows the arbitration process to continue while the court is deciding the issue.[811]

Turning to Scotland, like the Model Law and the SAL 2012 (see below), mandatory r.8 of the SAR imposes a duty on prospective arbitrators to disclose any circumstances

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[809] CLOUT case No 442, Oberlandesgericht Köln, Germany, 9 Sch 30/00, 14 September 2000 <http://www.dis-arb.de/de/47/datenbanken/rspr/olg-köln-az-9-schh-30-00-datum-2000-09-14-id131> accessed 30 November 2017.

[810] UNCITRAL, *Report of the UN Commission on International Trade Law (on the work of its eighteenth session)*, Official Records of the General Assembly, Fortieth Session, Supplement No 17, A/40/17 (UN 1985), paras 121-125.

[811] *Nikiforos v Petropoulos* [2007] QCCS 3144 (Quebec SC, Canada).

that 'might reasonably be considered relevant when considering whether the individual is impartial and independent'. While both the Model Law and Scottish Act make explicit that the duty applies once a person is asked to be an arbitrator, the SAL 2012 appears to impose the duty only once the appointment has been taken up. The approach of the Model Law and Scottish Acts may allow the issue to be resolved prior to the appointment, which is more efficient than the procedure under the SAL 2012. Similarly, the absence, under the Scottish Act and Model Law, of any requirement that the disclosure should be in writing, may facilitate the process. Given the availability of electronic communication, however, any advantage that this brings is outweighed by the evidentiary certainty of making the disclosure in writing, as required by the SAL 2012.

Under default r.10 of the SAR, the arbitrator's appointment may be challenged for the same reasons provided for by the Model Law, but with the additional reason that the arbitrator 'has not treated the parties fairly'. Since unfair treatment raises doubts regarding the arbitrator's impartiality and independence, this additional ground is arguably implicit to the grounds for challenge under both the Model Law and the SAL 2012. The benefit of making this ground explicit, however, is greater clarity and certainty. Rule 10 also makes explicit that the challenge must state the facts and that notice must be given to the other party, which again provides greater clarity and certainty for the parties.

While r.10 imposes different time limits, the most significant substantive distinction between the Scottish Act and the SAL 2012, is that r.10(4) provides that where a tribunal fails to decide within the fourteen-day time limit then the arbitrator's appointment is automatically revoked. The SAL 2012 requires the tribunal to decide within fifteen days, but is silent on any consequence for exceeding this time limit. The clarity and certainty of the Scottish approach is to be preferred as more cost-effective and just, although automatically removing the arbitrator prioritises the interests of the party bringing the challenge.

The interests of the party bringing the challenge are further favoured by the challenge procedure. Like the Model Law and the SAL 2012, the Scottish Act allows an application to be made to the court where a challenge fails. In the interests of efficiency, however, there is no appeal against a successful challenge. While this impacts on the autonomy of the party opposing the challenge, it constrains the delays caused by the challenge procedure. Furthermore, it prioritises the natural justice principle of *nemo index in causa sua* and the importance of ensuring that justice is seen to be done by prioritising the removal of an arbitrator whose impartiality or independence has been challenged.

The main difference between the Scottish Act and the SAL 2012 is that, through mandatory rr.12-14, the Scottish Act provides the clarity and certainty of more detailed rules, which might usefully be emulated by the SAL 2012. Thus, r.12 clearly sets out the grounds on which a court may remove an arbitrator. These broadly correspond to those allowed under the SAL 2012, but include the ground that a substantial injustice has been caused because the arbitrator has failed to comply with the procedural rules agreed by the parties or contained within the SAR. This provides Scottish courts with an additional power, but one that serves the interests of justice and party autonomy. Furthermore, under mandatory r.13, the SAR allows the court the power to dismiss the whole tribunal for the same reason, which again serves the interests of justice and party autonomy.

These provisions, which go beyond the power traditionally available under a judicial review procedure, [812] usefully draw an explicit connection between the conduct of the arbitrator, the implementation of the agreed rules of procedure and natural and procedural justice. It should, however, be emphasised that the court's role in policing arbitration, is limited to those cases where the procedural failings breach natural justice or result in a substantial injustice.[813] Thus, minor procedural failings will not

[812] See, eg, *Kyle and Carrick District Council v AR Kerr & Sons* 1992 SLT 629.

[813] Arbitration (Scotland) Bill: Policy Memorandum (2009), paras 130-131.

justify dismissal of an arbitrator or tribunal.[814] This provides a reasonable balance between facilitating an efficient and cost-effective process, party autonomy and justice. The power to remove an arbitrator both allows the court to act where natural justice has been breached, but also acts as a deterrent, discouraging the arbitrator from acting unfairly. This deterrence is supported by mandatory r.16 of the SAR, which allows the court to make an order regarding the arbitrator's entitlement to fees and expenses, or the arbitrator's liability to make repayments of money already received. Under this rule, the court may make an order that reflects the arbitrator's culpability for significant breaches of procedural or natural justice.[815]

Turning to Saudi Arabia, article 12 of the Model Law, which provides for the grounds on which an arbitrator may be challenged, is implemented by article 16 of the SAL 2012. While the wording has changed, the effect of article 16 should broadly correspond to the Model Law provision. One difference is that the arbitrator must notify the parties in writing of any circumstances likely to raise 'reasonable doubt as to his impartiality'. Under the Model Law, there is no requirement for writing and the duty refers to 'justifiable doubt'. Since justifiable doubt effectively means that any doubt must be supported by reasons, the change of wording should not be of practical importance. The requirement for writing is a useful clarification that should facilitate evidentiary certainty in any challenge to the arbitrator's mandate.

A second difference is that article 16(2) of the SAL 2012 specifies that arbitrators are precluded from sitting on a tribunal, regardless of whether their mandate has been challenged, where the same circumstances would preclude a judge from hearing a case. This emphasises the quasi-judicial role of the arbitrator and the state's interest in ensuring justice is both done and seen to be done. While there is no equivalent provision in the Model Law, national courts have interpreted the natural justice

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[814] Derek P Auchie, Richard Farndale, Chris Mackay, Coral Riddell, *The Scottish Arbitration Survey: Report No 1* (2015), 6.3.2.

[815] Fraser Davidson, 'Some thoughts on the Draft Arbitration (Scotland) Bill (2009) 1 *Journal of Business Law* 44, 56-57.

requirement of impartiality and independence to be the same as that imposed on domestic judges.[816] A similar approach is taken by the English courts.[817]

While this means that the standard of the test is broadly equivalent, although parasitic on the national law, it still leaves the key difference that the Model Law requires the arbitrator to disclose relevant circumstances and the parties to make a challenge, but the SAL 2012 imposes a duty on arbitrators to recuse themselves. While this provides a useful safeguard for the parties' interests, it does so at the expense of party autonomy. Furthermore, it creates the uncertainty that an award may be open to challenge where an arbitrator remained on a tribunal in circumstances raising reasonable doubt as to the arbitrator's impartiality regardless of any actual bias.[818] Despite these concerns, the additional uncertainty and the limited impact on party autonomy are outweighed by the greater protection of the parties' and state's justice-based interests.

Like article 13 of the Model Law, article 17 of the SAL 2012 balances autonomy and justice by allowing the parties to determine the procedure for challenging an arbitrator's mandate, while also providing a default procedure. Although the Model Law imposes a fifteen-day limit on the challenge, with no time limit imposed on the tribunal for deciding the issue, article 17(1) of the SAL 2012 imposes a five-day limit on the initial application and a fifteen-day limit on the tribunal for issuing a decision. This should limit any delays caused by the challenge, improving the efficiency and cost-effectiveness of the process.

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[816] CLOUT case No 1062, Oberlandesgericht Köln, Germany, 9 Sch 22/03, 2 April 2004 <http://www.dis-arb.de/de/47/datenbanken/rspr/olg-köln-az-9-sch-h-22-03-datum-2004-04-02-id291> accessed 30 November 2017; *Jung Science Information Technology Co Ltd v ZTE Corporation* [2008] HKCFI 606, [49].

[817] *AT&T Corp v Saudi Cable Co* [2000] 2 All ER (Comm) 625, 637-638 *per* Lord Woolf MR.

[818] Faris Nesheiwat, Ali Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia' (2015) 13 *Santa Clara Journal of International Law* 443, 453.

Like the Model Law, the SAL 2012 allows the parties thirty days to appeal a failed challenge to a competent court, whose subsequent decision is not subject to appeal. Also like the Model Law, the SAL 2012 allows the arbitration process to continue while the court considers the application. Unlike the Model Law, however, article 17(3) of the SAL 2012 requires arbitration proceedings to be suspended while the challenge is being decided by the tribunal. This makes explicit what should be the pragmatic approach of the tribunal in any case. Where an arbitrator's mandate has been challenged, it makes sense, on grounds of efficiency, for the challenge to be resolved by the tribunal before continuing with the arbitration, especially given the fifteen-day time limit imposed on the tribunal.

Unlike the Model Law, which appears to preserve all prior proceedings and awards, article 17(4) of the SAL 2012 provides that a successful challenge renders 'non-existent' any prior proceedings or award. This has the disadvantage of effectively requiring the arbitration process to start afresh, rehearing all witnesses and re-examining all documents and other evidence. While this is likely to impact on the duration and cost of the arbitration, it removes a possible ground for subsequently challenging any award and the danger that the entire process will be undermined. Thus, it provides greater certainty for the parties at the expense of the additional delay. It also provides greater protection for the justice-based interest of the parties and the state since it reflects the Islamic legal maxim that declares as false anything that has itself been built on a falsehood.[819] It is further supported by the opinion of Umar ibn Al-Khattab (583 CE-644CE), a respected Muslim Caliph and authoritative jurist,[820] who explained that: 'returning to the truth is better than persisting in falsehood'.[821]

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[819] Faris Nesheiwat, Ali Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia' (2015) 13 *Santa Clara Journal of International Law* 443, 454 (n 78).

[820] See Ali Muhammas as-Sallabi, *Umar Ibn Al Khattab: His Life and Times* (volumes 1 and 2) (International Islamic Publishing house 2008).

[821] Sa'eed ibn Mut'ib Al-Qahtaanee, 'A Study of the Legal Maxim "No Validity is Attached to Conjecture which is Obviously Tainted by Error (Laa Ibrata Bidh-Dhann-il Bayyani Khata'uhu)" and its Juristic Applications' (2014) Issue 62 *Al-Adl* 41, 84.

Finally, article 17(2) of the SAL 2012 makes clear that parties cannot reapply for dismissal unless they have new, previously unknown, grounds for challenging the arbitrator's mandate. This provision is lacking from the Model Law, but, in practice, is likely to be implicit to the rule provided for by article 13(2). Since a party must bring a challenge within fifteen days of gaining actual knowledge of the reasons raising doubts regarding the arbitrator's impartiality or independence, there is little opportunity for the party to bring a second challenge relying on the same reasons. This becomes even more unlikely under the five-day limit imposed by the SAL 2012. Thus, article 17(2) is unlikely to be of any practical significance beyond the additional clarity it provides to the limits on the parties' freedom to make an application challenging the arbitrator.

4.4.3 Efficiency and effectiveness

While a concern with the efficiency and effectiveness of the tribunal and arbitration process is apparent in most of the provisions, article 14 of the Model Law is specifically devoted to these issues. It provides that, where an arbitrator 'becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from office or if the parties agree on the termination'. This means that an inefficient or ineffective arbitrator may be removed,[822] allowing the appointment of a substitute arbitrator under article 15. Thus, arbitrators may be removed where they have been arrested and detained,[823] are unable to fulfil their duties because of illness,[824] or where the delay caused by their failure to

[822] UNCITRAL, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, A/CN 9/264 (UN 1985), 34.

[823] *Noble Resources Pte Ltd v China Sea Grains and Oils Industry Co Ltd* [2006] HKCFI 334 (Hong Kong).

[824] Oberlandesgericht Köln, Germany, 9 Sch 27/02, 11 April 2003 <http://www.dis-arb.de/de/47/datenbanken/rspr/olg-köln-az-9-schh-27-02-datum-2003-04-11-id323> accessed 30 November 2017.

complete their duties has 'been so inordinate as to be unacceptable' clearly falling below 'the standard of what may reasonably be expected from an arbitrator'.[825]

These provisions minimise unnecessary delay and ensure an effective panel of arbitrators, capable of carrying out their tasks. They also respect party autonomy by allowing the parties to agree to waive the provisions of article 14 and permitting the issue to be determined by, for example, the appropriate institutional rules.[826] Where article 14 is not waived, party autonomy is respected by empowering the parties to jointly terminate the arbitrator's mandate and, under article 15, appoint a substitute arbitrator according to the original arbitration appointment procedure. Furthermore, the interests of autonomy and justice are served by allowing an application to the courts where the parties are unable to agree on the termination. Again, undue delay is prevented by precluding any appeal from the court's decision, but article 14(1) is deficient in failing to provide a time-period limiting the freedom of the party to apply to court for a decision.

Similar provisions are found in the Scottish Act, although default r.9 makes it clear that, where an 'arbitrator becomes ineligible to act as arbitrator', then the arbitrator's mandate terminates automatically. This means that there is no need for the parties to agree or involve the tribunal, unless, presumably, there is doubt regarding the arbitrator's incapacity. Default r.11 allows the parties to agree to remove the arbitrator, and does not require any reason to justify the removal, which maximises respect for the principle of party autonomy. Although not requiring any reasons, r.11 allows the parties to jointly remove an arbitrator who has caused unnecessary delay by failing to fulfil the responsibilities imposed by mandatory r.24. Where the parties are unable to agree on removal, then an application may be made to the court to

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[825] UNCITRAL, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* A/CN 9/264 (UN 1985), 34.

[826] UNCITRAL, *Report of the UN Commission on International Trade Law (on the work of its eighteenth session)*, Official Records of the General Assembly, Fortieth Session, Supplement No 17, A/40/17 (UN 1985), para 136.

remove an arbitrator who is 'incapable of acting as an arbitrator' or who has caused a substantial injustice by failing to conduct the arbitration consistently with the SAR, which includes the duty under mandatory r.24 to not cause unnecessary delay. Along with default r.17, which provides for the reconstitution of the tribunal, these serve to facilitate the efficiency and effectiveness of the arbitration process.

In the case of Saudi Arabia, which follows the Model Law, articles 18 and 19 of the SAL 2012 provide for the removal and replacement of arbitrators who are no longer able to complete their duties or have suspended performance causing an undue delay. Like article 14 of the Model Law, article 18 provides the parties with the power to jointly dismiss the arbitrator, or to apply to the competent court for a decision where they are unable to agree. The decision of the court is similarly not open to appeal. Following article 15 of the Model Law, article 19 provides that a replacement must be appointed according to the rules that applied to the appointment of the original arbitrator. This respects the autonomy of the parties as expressed in their original agreement. Where a replacement arbitrator is not appointed then any award may be vacated for procedural irregularity under article 50(1) of the SAL 2012.[827]

Although, as explained previously, the SAR provide a clearer and more comprehensive set of rules than either the Model Law or the SAL 2012, the substantive approach is broadly similar. Thus, consistent with the Model Law, both the SAL 2012 and the Scottish Act allow for the arbitrators to be removed and replaced where they are incapable of acting as arbitrator or where they caused undue delay by failing to fulfil their obligations. Perhaps the main substantive difference, apart from explicitly allowing the court the power to make an order regarding the arbitrator's entitlements and liabilities under mandatory r.16, is that the court's power to remove the arbitrator for causing an undue delay is limited to those cases where the delay has resulted in substantive injustice.[828] This does not prevent the parties

[827] Arbitration case, (2015 (1437H)) case no 37165818, Mecca Court of Appeal.

[828] SAR, mandatory rule 12(e).

from jointly removing an arbitrator who has caused a delay, but it does limit the court's power where the parties are not in agreement. This shifts the balance towards the principle of autonomy, while still allowing the court to deal with cases where the delay results in a substantive consequence. This is more consistent with the spirit of arbitration than the approach under the Model Law and the SAL 2012. As such, the SAL 2012 could be improved by following the Scottish approach, both in terms of providing a clearer and more explicit set of rules, but also by limiting the court's power through an explicit requirement for a substantive injustice. Such an approach would further help to encourage a pro-arbitration culture and counter the criticisms made of the 1983 law, that the Saudi courts had too much scope for intervening in the arbitration process.

4.5 Conclusion

The whole point of arbitration is to resolve a dispute between two or more parties in a way that provides an attractive alternative to litigation. This means the arbitration process must meet the needs of the parties and protect the interests of both the parties and the state that enables, facilitates and supports the process by enforcing the final award. While arbitration should be sufficiently flexible to allow the parties the autonomy to shape the proceedings to suit their needs, some interests are common to all parties. Because of their commonality, they coincide with the interests of any state seeking to attract commercial arbitration business. These interests constitute the procedural justice principles that the arbitration process should be effective, efficient and cost-effective. Also important are the principles of formal justice that the parties should be treated equally, and that the rules should clear and accessible. The formal principle of equality is given substance through the natural justice principle of *audi alterem partem*. It is further supported by the natural justice principle of *nemo index in causa sua*, which demands the independence and impartiality of arbitrators.

All three legal frameworks explicitly provide for equality and the natural justice principles of *audi alterem partem* and *nemo index in causa sua*. This provides the necessary support for ensuring that arbitration is indeed formally just by requiring

that the tribunal is impartial, treats all parties equally and gives them an equal and 'full' or 'reasonable' opportunity to be heard. On this, there is little to choose between the Model Law, the Scottish Act, and the SAL 2012, which provides for a procedurally just legal framework in line with the third subsidiary hypothesis. The real test is how the arbitration process works in practice and how the courts respond to any irregularities. If the experience of the Model Law in other countries is anything to go by, then the approach is likely to be one that sees the courts interfering only where a breach results in substantive injustice. It is, however, difficult to predict given the absence of any concept of precedence and the lack of any formal system for reporting judicial decisions.[829]

All three legal frameworks provide the basis for a cost-effective process, albeit to different degrees. While the SAL 2012 is based on the Model Law, and 'relaxe[s] many of [the] once stringent conditions such as location, language and procedure of arbitration',[830] it still imposes more formalities and restrictions on party autonomy. The negative impact of these differences on the flexibility of the arbitration process are offset, at least to a degree, by the greater efficiency and evidentiary certainty that they bring. They do, however, open the door for technical challenges, but these should not affect the award unless there has been a substantive injustice. It is, however, unfortunate that the SAL 2012 did not follow the example of the SAR and provide a comprehensive and accessible set of rules that provide flexibility through the default rules and protect formal, natural and procedural justice through clearly stated mandatory rules. It is also unfortunate that the SAL 2012 does not provide for rules on confidentiality. Furthermore, the SAL 2012 might be improved through the creation of a role like the arbitral appointments referee under the Scottish Act. Nevertheless, it is more liberal then the SAL 1983 and provides a reasonable implementation of the Model Law's approach to the arbitration tribunal and

[829] Dina Elshurafa, 'The 2012 Saudi Arbitration Law and the Sharia factor: a friend or foe in construction?' (2012) 15 *International Arbitration Law Review* 132.

[830] Dina Elshurafa, 'The 2012 Saudi Arbitration Law and the Sharia factor: a friend or foe in construction?' (2012) 15 *International Arbitration Law Review* 132, 139.

proceedings,[831] allowing the parties the freedom to define their own rules or to choose institutional rules, necessarily subject to *Sharia* compliance.

In this chapter, the focus has been on the legal framework regulating the arbitration tribunal and proceedings. As with the approach throughout the thesis, the SAL 2012 was assessed by examining how well it balanced the three core principles of ICA and it was suggested that the framework could be improved through the provision of a complete set of arbitration rules along with the creation of role like the Scottish arbitral appointments referee. In chapter five, the focus shifts to consider the balance between the core principles achieved by the legal framework in the context of the arbitration award.

[831] See, Faris Nesheiwat, Ali Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia' (2015) 13 *Santa Clara Journal of International Law* 443, 455. These authors suggest the differences between the new KSA Law and the Model Law are 'superficial'. This analysis suggests that they understate the distinctions.

Chapter Five: Examination of the Core Principles in the Context of The Arbitration Award

5.1 Introduction

The goal of arbitration is to provide disputing parties with a solution that resolves their respective rights and obligations.[832] It provides an alternative to litigation, but to be viable arbitration must offer the parties an advantage over litigation. This advantage is found primarily in the procedural flexibility afforded by arbitration compared to the more rigid formality of litigation. That procedural flexibility, which was considered in the previous chapter, however, cannot be achieved at the expense of a satisfactory outcome. No amount of flexibility can compensate for an inability to resolve the dispute. Regardless of arbitration's appeal as a flexible mechanism for resolving disputes, no one will choose arbitration unless it can offer an effective solution.[833] Barring settlement, that solution is found in the award 'rendered at the end of the arbitral process'.[834]

The ability to effectively resolve the dispute by making an award is fundamental to the success of arbitration. Not any award will do, however, since it is unlikely that a wholly unjust award will provide an acceptable resolution. In a discussion of what parties want from arbitration, Paulsson pithily comments: 'We seek fairness, but settle for law'.[835] This highlights the importance of justice embodied by the fairness of the procedure 'as consonant with [the] legitimate expectations' of the parties in their 'quest

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[832] Julian DM Lew, Loukas A Mistelis, Stefan Michael Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), 1-3

[833] The same might be said of other attractive features of arbitration, such as the expertise of the arbitrators, the freedom to select arbitrators, confidentiality: see, School of International Arbitration Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015), 6.

[834] Michael Hwang SC, Yeo Chuan Tat, 'Recognition and Enforcement of Arbitral awards' in Michael Hwang SC, *Selected Essays in International Arbitration* (Singapore International Arbitration Centre 2013) 237, 239.

[835] Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2103), 14.

for civilized closure' of their dispute.[836] As such, if arbitration is to be effective, and provide a desirable alternative to litigation, it must be capable of producing a just, acceptable and final award that resolves the parties'.[837]

In identifying the goal of arbitration as an acceptable, just and final resolution to the dispute, it should be noted that these conditions are not independent of each other. The relationship between the three concepts is well illustrated by the saying attributed to Rudyard Kipling, that "nothing is ever settled until it is settled right".[838] The parties expect that arbitration will result in a final, binding and enforceable award,[839] but it is only final in the sense that it terminates the arbitration proceedings. In this chapter, the binding finality and enforcement of arbitration awards will be examined. The discussion will also address the nature of an award, the arbitrator's power to make an award, the procedure for making the award and the possibility of challenging the award. As with the preceding chapters, this examination will rely on the core principles of party autonomy, justice and cost-effectiveness as the normative basis for the comparative analysis.

5.2 The Nature of the Award

Gaillard and Savage observe that: 'The concept of the arbitral award has been the subject of considerable debate', which is reflected in the lack of definition of the term in most of the instruments governing ICA.[840] Blackaby et al similarly note: 'There is

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[836] Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2103), 13.

[837] Julian DM Lew, Loukas A Mistelis, Stefan Michael Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), 6.

[838] Vladimir Balas, 'Review of Awards' in Peter Muchlinski, Frederico Ortino, Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1126.

[839] Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern & Hunter: Law and Practice of International Commercial Arbitration* (6th edn, Oxford University Press 2015), 1.101, 9.01-9.03.

[840] Emmanuel Gaillard, John Savage (eds), Fouchard, Gaillard, *Goldman on International Commercial Arbitration* (Kluwer Law International 1999), 735-736.

no internationally accepted definition of the term "award"'.[841] They suggest that: 'The term "award" should generally be reserved for decisions that finally determine the substantive issues with which they deal'.[842] Moses also suggests that an "award" is the 'final decision by the arbitrators, dispositive of the issues of the case'.[843] In principle, a final arbitration award should, then, at least have the force of *res judicata*, precluding further arbitration or litigation of the same dispute.[844] Following these definitions, the arbitration award is, in the absence of a settlement, the mechanism for resolving the dispute between the parties and terminating the arbitration proceedings. Like a legal judgment, an arbitration award alters the parties' rights and obligations with the aim of restoring a balance that is a substantively acceptable solution to the parties' disagreement.

5.3 The Arbitrator's Power to Make an Award and the Accompanying Duties

As discussed in chapter two, the tribunal's power to make an award flows essentially from its jurisdictional authority generated by the parties' agreement and enabled by national law.[845] Implicit to this is the expectation that the arbitrators' power will be exercised responsibly. The parties trust the arbitrators to act rationally and fairly in making an award and the transfer of power is made on the condition that the trust placed in the arbitrators will not be breached. This trust creates a moral duty that supports the legal duty imposed by the contract between the parties and the

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[841] Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern & Hunter: Law and Practice of International Commercial Arbitration* (6th edn, Oxford University Press 2015), 9.05.

[842] Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern & Hunter: Law and Practice of International Commercial Arbitration* (6th edn, Oxford University Press 2015), 9.08.

[843] Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012), 189.

[844] Stavros Brekoulakis, 'The Effect if an Arbitral Award and third Parties in International Arbitration: Res Judicata Revisited' (2005) 16 *American Review of International Arbitration* 177; Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012), 198.

[845] Susan D Franck, 'The Role of International Arbitrators' (2006) 12 *ILSA Journal of International and Comparative Law* 499, 508.

arbitrators.[846] Furthermore, given that arbitration takes place within the context of a national legal system, the mandatory rules of the relevant national law create an additional source of duty on the arbitrators.[847] These duties limit the extent of the arbitrators' power to make an award.

The content of the arbitrators' moral duty may be determined by using Rawls' veil of ignorance as a theoretical device allowing a consideration of what the parties would want from arbitration if they did not know whether they were a claimant or a respondent. As Rawls explains:

> The idea ... is to set up a fair procedure so that any principles agreed to will be just ... [by] nullify[ing] the effects of special contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage.[848]

A good starting point is the result of a survey of parties involved in arbitration, which found that 81% of 130 participants ranked a "fair and just result" as the most important feature of arbitration, as previously discussed.[849] This is further supported by the more recent 2013 survey discussed in chapter three, which emphasised the importance of both arbitrator neutrality and the expertise of the arbitrator.[850]

The distinction between arbitrator neutrality and expertise reflects the distinction between procedural and substantive justice. Both are important, regardless of whether one is a claimant or a respondent. Although it is likely that opposing parties will have

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[846] Martin Platte, 'An Arbitrator's Duty to Render Enforceable Awards' (2003) 20 *Journal of International Arbitration* 307, 309.

[847] Gunther J Horvath, 'The Duty of the Tribunal to Render an Enforceable Award' (2001) 18 *Journal of International Arbitration* 135, 138-140.

[848] John Rawls, *A Theory of Justice: Revised Edition* (The Belknap Press 1999), 118.

[849] Richard W Naimark, Stephanie E Keer, 'What do parties really want from international commercial arbitration?' 57 (2002) *Dispute Resolution Journal* 78, 80.

[850] School of International Arbitration Queen Mary University of London, *Corporate choices in International Arbitration: Industry perspectives* (2013), 1, 8.

different views of a substantively just outcome, from behind the veil of ignorance they are likely to agree that the arbitrator has a duty to make the award as "accurate" as possible.[851] As Park explains: 'The arbitrator should aim to get as near as reasonably possible to understanding what actually happened between the litigants, and how the pertinent legal norms apply to the controverted events'.[852] This at least requires that the award is warranted because it is rationally based on the evidence and arguments presented during the hearing of the dispute.[853] It might also be argued, however, that it implies a further duty to give reasons, explaining how the award is consistent with the facts and the parties' cases. Giving reasons may make it easier for the losing side to understand and accept the award.[854]

In addition to the substantive duty of accuracy, the parties' interest in justice also requires duties to be imposed on the tribunal to ensure a procedurally fair process.[855] These include ensuring that the arbitrators are independent of the dispute, precluding any conflict of interest. It also imposes the natural justice duty of equal treatment, requiring that the arbitrators are impartial and afford all parties an equal and sufficient opportunity to be heard.

Related to both procedural and substantive justice, but fundamentally driven by the respect required for party autonomy is the obligation that the arbitrators remain within the limits of their jurisdictional authority. To make an award that exceeds the

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[851] William W Park, 'Arbitrators and Accuracy' (2010) 1 *Journal of International Dispute Settlement* 25.

[852] William W Park, 'Arbitration in Autumn' (2011) 2 *Journal of International Dispute Settlement* 287, 291.

[853] Catherine A Rogers, 'The Vocation of the International Arbitrator' (2005) 20 *American University International Law Review* 957, 990-991; Susan D Franck, 'The Role of International Arbitrators' (2006) 12 *ILSA Journal of International and Comparative Law* 499, 505-507.

[854] William W Park, 'Arbitration in Autumn' (2011) 2 *Journal of International Dispute Settlement* 287, 312.

[855] Susan D Franck, 'The Role of International Arbitrators' (2006) 12 *ILSA Journal of International and Comparative Law* 499, 512-513; William W Park, 'Arbitration in Autumn' (2011) 2 *Journal of International Dispute Settlement* 287, 291.

boundaries of the tribunal's jurisdiction is to exceed the power granted by the parties' agreement and is both unjust and an infringement of the parties' right to determine the scope of the arbitration.

While the duties to make an award that is both accurate and procedurally just are perhaps the most important, the arbitrators also have an obligation to ensure that the award is made without undue cost or delay.[856] That the parties have an interest in the process being efficient and cheap is reflected consistently in survey responses, which show that cost[857] and speed are considered important attributes, but less important than features serving the interests of justice.[858]

A final, and important[859] if controversial obligation, is the duty on the arbitrators to do 'their best to render an enforceable award'.[860] In his empirical study, based partly on interviews with 20 practising arbitrators, Karton noted that the duty was taken seriously by the respondents, as an obligation ‘imbued ... with a kind of moral force'. Consider, for example, the response of a London-based barrister who acknowledged:[861]

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[856] William W Park, 'Arbitration in Autumn' (2011) 2 *Journal of International Dispute Settlement* 287, 291.

[857] School of International Arbitration Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration* (2010), 21-22.

[858] Richard W Naimark, Stephanie E Keer, 'What do parties really want from international commercial arbitration?' 57 (2002) *Dispute Resolution Journal* 78, 80; School of International Arbitration Queen Mary University of London, *Corporate choices in International Arbitration: Industry perspectives* (2013), 8; School of International Arbitration Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015), 6.

[859] Gunther J Horvath, 'The Duty of the Tribunal to Render an Enforceable Award' (2001) 18 *Journal of International Arbitration* 135.

[860] Martin Platte, 'An Arbitrator's Duty to Render Enforceable Awards' (2003) 20 *Journal of International Arbitration* 307, 309. See also, William W Park, 'Arbitration in Autumn' (2011) 2 *Journal of International Dispute Settlement* 287, 292.

[861] Joshua DH Karton, *The Culture of International Arbitration and The Evolution of Contract Law* (Oxford University Press 2013), 43.

> a legal obligation on you and also, I would say, a moral obligation to very carefully consider the decision you're going to make. That for me is a key point.

For Platte, this duty arises because the *raison d'être* of arbitration lies in the resolution of a dispute provided by a final, binding and enforceable award. Platte suggests that the duty may be satisfied by the arbitrator complying with both the *lex arbitri* and the NY Convention.[862] Such a duty is recognised by, for example, the current International Chamber of Commerce (ICC) Rules of Arbitration 2017, which provide under article 42 that: '… the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law'.[863]

While it is difficult to argue against the duty as Platte defines it, problems arise if it is relied on as a fundamental obligation without appreciating the need to more fully determine the nature of the duty. Boog et al, for example, note that:

> An arbitral tribunal's duty to render an enforceable award is frequently used by commentators and counsel alike in support of positions on myriad matters ranging from procedural fairness and jurisdiction to the application of mandatory foreign law. Its considerable malleability has indeed made it very attractive as conceptual support for practically any argument.[864]

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[862] Martin Platte, 'An Arbitrator's Duty to Render Enforceable Awards' (2003) 20 *Journal of International Arbitration* 307, 311-312.

[863] ICC, *The ICC Rules of Arbitration* (2017) <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_41> accessed 30 November 2017.

[864] Christopher Boog, Benjamin Moss, Schellenberg Wittmer, 'The Lazy Myth of the Arbitral Tribunal's Duty to Render an Enforceable Award' (Online, 28 January 2013) *Kluwer Arbitration Blog* <http://kluwerarbitrationblog.com/2013/01/28/the-lazy-myth-of-the-arbitral-tribunals-duty-to-render-an-enforceable-award/> accessed 30 November 2017.

Such a duty, they suggest, may cause the tribunal to be overly prudent and affect its ability to conduct proceedings efficiently. They not only suggest that: 'there is little persuasive evidence that such a duty exists to the extent claimed', but also that:

> it is self-evident that the arbitral tribunal should make efforts, to the extent it can, to provide for enforceability of its award. But we do not need to, nor could we, capture every practical or common sense responsibility of the arbitral tribunal as a formal duty.

Boog et al have a strong argument if, as they define it, the duty is to render an enforceable award. This, however, is not the duty as defined by Platte, or as reflected in the ICC rule. First, it is crucial to recognise that the duty is limited by what is feasible. Second, while it might be argued that complying with the mandatory rules of arbitration and the NY Convention are self-standing duties, a general duty has the advantage of providing explanatory force to the specific duties. It organises them through a general principle that allows the content of the duty to be developed or amended as arbitration changes. If, as Boog et al, acknowledge, the arbitration tribunal has a 'common sense responsibility' to make all feasible efforts to render an enforceable award, then the duty exists. Rather than leaving it as a vague matter of common sense, it is better to formalise and properly define the duty. As Menon comments, the global growth and professionalisation of arbitration,[865] makes it: 'impossible for the industry to continue to depend on implied norms, understandings, peer standards, and shared values when these might no longer exist'.[866]

Although the tribunal cannot guarantee enforceability, it can nevertheless be expected to do what is reasonable to ensure an enforceable award. This duty, however, must be

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[865] Emmanuel Gaillard, 'Sociology of International Arbitration' in David D Caron, Stephan W Schill, Abby Cohen Smutny, Epaminontas E Triantafilou (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 187, 190.

[866] Sundaresh Menon, 'The Transnational Protection of Private Rights' in David D Caron, Stephan W Schill, Abby Cohen Smutny, Epaminontas E Triantafilou (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 17, 27.

balanced against the interconnected duties of efficiency, respect for party autonomy and justice. Boog et al's argument against a duty to ensure enforceability emphasises the obligation of efficiency. Although time and cost are important, they do not outweigh the need for arbitration to be effective. This requires the process to produce an enforceable award. Winning an arbitration would be a Pyrrhic victory if the award is unenforceable. After all, the parties' interests are better served by acknowledging that arbitration's primary goal is to resolve the dispute by making an enforceable award. It is cost-effectiveness, rather than efficiency *per se*, that must be balanced against justice and autonomy. The importance of focusing on cost-effectiveness, with the emphasis on effectiveness, is reflected in the results of the 2015 survey of ICA, which found that "enforceability" was ranked as one of the three most valuable characteristics of arbitration by 65% of respondents, while cost and lack of speed were ranked as one of the three worst features of arbitration by 68% and 36% respectively.[867]

From behind the veil of ignorance, then, the following duties might be imposed on an arbitrator in relation to an arbitration award. First, accepting that enforceability cannot be guaranteed, it would be reasonable to expect the arbitrator to render an award in a manner that ensures that enforcement would not be refused under the NY Convention or the *lex arbitri*. While arbitration should be managed to maximise efficiency, effectiveness - and hence cost-effectiveness - should not be compromised by cost-cutting shortcuts that jeopardise enforceability. Second, the award must be consistent with party autonomy and the tribunal's jurisdiction. Third, the arbitrators should act with fairness and impartiality in rendering the award. Fourth, the award should be based on a reasoned argument that accurately reflects the evidence and the parties' arguments. Finally, the reasons for the award should be made explicit, so that the parties can understand the justice of the award.

[867] School of International Arbitration Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015), 6-7.

5.4 The Limits on the Arbitrator's Power to Make an Award and the Opportunity for Challenge

In taking a dispute to arbitration, the parties place their trust in the arbitrators to efficiently make a just and enforceable decision, based on the evidence and arguments presented during the hearing of the dispute. The problem with trust is that it can be broken, whether intentionally or unintentionally. The consequence of such a breach of trust is an unfair or unenforceable award that fails to restore a just balance of rights and obligations between the parties, leaving the dispute inadequately resolved. This raises two issues: the *ex ante* limits to the tribunal's power to make an award, which determines its validity; and the *ex post* power afforded to the parties to challenge an award or resist its enforcement.

Ex ante, the tribunal is constrained by the extent of the jurisdiction afforded by the parties' agreement and the procedural rules,[868] which act to ensure that the arbitrators do not exceed their power and conduct the arbitration in a way that is fair to both parties. These constraints, which were discussed in chapters two and three, define the extent of both the arbitrators' power and their duties. Furthermore, in making a valid and enforceable award, the tribunal must comply with any formal requirements set down by the applicable rules of arbitration.[869] Where the arbitration tribunal exceeds its power, or breaches its duty, then any adversely affected party may have grounds for challenging the award rendered by the tribunal.

Once made, the award may still be open to limited judicial review, which raises the question of how to balance the values of legal accuracy, finality, efficiency, justice and autonomy.[870] As a starting point, the opinion of the European Court of Justice

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[868] Joshua DH Karton, *The Culture of International Arbitration and The Evolution of Contract Law* (Oxford University Press 2013), 45.

[869] Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012), 194.

[870] Irene M Ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 *International Law and Politics* 1109, 1140.

(ECJ) in *Eco Swiss China Time Ltd v Benetton International NV*, reflects the general attitude towards judicial review of arbitration. In deciding that the national courts of a member state must vacate an award that is contrary to fundamental community law, the ECJ observed that:

> it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances.[871]

Lying behind this attitude is the argument that the parties' presumed intention is for the dispute to be arbitrated rather than litigated, with the arbitration award effectively resolving the dispute. This would allow the parties to put the issue behind them and return to "business as usual".[872]

As Rogers explains:

> The standards for national court review of arbitral awards were designed with a strong pro-enforcement bias … The purpose of the pro-enforcement bias is to avoid having the substantive decision-making effectively shifted back to national courts under the guise of award review, with attendant risk that awards would have less currency.[873]

This highlights the tension between the need to ensure that the dispute is resolved by rendering a fair award and the need to respect the parties' original intentions to resolve the matter through arbitration, rather than litigation. In defining the relationship between arbitration and litigation, there is a second tension between ensuring that the

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[871] Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-03055, [35]

[872] Pierre Lalive, 'Absolute Finality of Arbitral Awards?' *in Revista Internacional de Arbitragem e Conciliaçao-Año I-2008* (Associação Portuguesa de Arbiatragem, Almedina, 2009), 109. English version available at: <http://www.arbitration-icca.org/articles.html?author=Pierre_Lalive&sort=author> accessed 30 November 2017.

[873] Catherine A Rogers, 'The Vocation of the International Arbitrator' (2005) 20 *American University International Law Review* 957, 973.

award is just or correct and ensuring that the award is final and legally certain.[874] These tensions are resolved by allowing the parties the option of applying to the national courts for judicial review of the award, but limiting that review, in most jurisdictions, to the jurisdictional or procedural aspects the case.[875] This review procedure provides the applicant with the possibility of having the award set aside, but is not an opportunity to appeal the tribunal's decision on its merits.[876]

Although the international trend is to restrict any review to procedural or jurisdictional issues, in a significant minority of jurisdictions[877] an application may be made to set aside the award because the tribunal made an error of law.[878] Jurisdictions that allow an application to be made where there has been an error of law notably include the US and England.[879] The US approach provides a good starting point for considering whether the courts should have the power to set aside an award for legal error.

US arbitration is governed by the Federal Arbitration Act (FAA),[880] which allows domestic arbitration awards to be vacated where there has been a manifest disregard of the law. The FAA is clear that the NY Convention applies to foreign awards, but

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[874] Pierre Lalive, 'Absolute Finality of Arbitral Awards?' *in Revista Internacional de Arbitragem e Conciliaçao-Año I-2008* (Associação Portuguesa de Arbiatragem, Almedina, 2009), 109; Hossein Abedian, 'Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review' (2011) 28 *Journal of International Arbitration* 553, 554.

[875] Joshua DH Karton, *The Culture of International Arbitration and The Evolution of Contract Law* (Oxford University Press 2013), 46, 76.

[876] Sundaresh Menon, 'The Transnational Protection of Private Rights' in David D Caron, Stephan W Schill, Abby Cohen Smutny, Epaminontas E Triantafilou (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 17, 26.

[877] Including, England, the US, Australia, New Zealand, Singapore, Malaysia, Hong Kong, Qatar, Argentina, Chile, Peru, Switzerland: Maximillian Evans, 'Appeals on a point of law: a comparative survey and regulatory competition' (2013) 79 *Arbitration* 357.

[878] Susan D Franck, 'The Role of International Arbitrators' (2006) 12 *ILSA Journal of International and Comparative Law* 499, 511.

[879] It is also available in Scotland, as will be considered later in section 5.6.3.

[880] Title 9, US Code Chapter 1.

since the US Supreme Court decision in *Hall Street Associates v Mattel, Inc.*,[881] the US Federal Courts of Appeal (circuit courts) are split on whether non-domestic awards rendered in the US may be set aside under the manifest disregard doctrine.[882]

It is beyond the scope of this thesis to explore the US position in detail. The US approach, however, highlights two controversies regarding judicial review. First is the question of whether an award may be vacated where there has been an error of law. The second is whether the parties may expand the scope of judicial review by agreement. In *Hall Street*, the Supreme Court held that the grounds for vacating an award under the FAA were exclusive and could not be expanded by the parties. This issue will be discussed below, but for the present it is the impact of *Hall Street* on the manifest disregard doctrine that warrants consideration. Chen notes that, even before the *Hall Street* decision, the circuit courts had failed to develop a 'uniform standard', although it was generally applied restrictively and infrequently, and had been completely rejected by the Seventh Circuit.[883] While *Hall Street* held that the grounds for vacating an award under the FAA were exclusive, it left open the possibility that the manifest disregard doctrine could nevertheless still be applied. The confusion caused by the Supreme Court has resulted in an inconsistent approach, with the doctrine applied by some,[884] but not all the circuit courts.[885]

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[881] *Hall Street Associates v Mattel, Inc* 552 US 576 (2008).

[882] Annie Chen, 'The Doctrine of Manifest Disregard of the Law after Hall Street: Implications for Review of International Arbitrations in US Courts' (2009) 32 *Fordham International Law Journal* 1872, 1873-1875.

[883] Annie Chen, 'The Doctrine of Manifest Disregard of the Law after Hall Street: Implications for Review of International Arbitrations in US Courts' (2009) 32 *Fordham International Law Journal* 1872, 1882.

[884] *Coffee Beanery Ltd v WW LLC* 300 F App'x 415, 419 (6th Cir 2008); *Stolt-Nielsen SA v Animal Feeds International Corporation* 548 F 3s 85, 94 (2nd Cir 2008); *Comedy Club Inc v Improv West Assocs* 553 F 3d 1277, 1281 (9th Cir 2009).

[885] *Citigroup Global Markets v Bacon* 562 F 3d 349 (5th Cir 2009); *Medicine Shoppe International v Turner Investments* 614 F 3d 485, 489 (8th Cir 2010); *Frazier v CitiFinancial Corporation* 604 F 3d 1313, 1324 (11th Cir 2010); *Affymax v Ortho-McNeil-Janssen Pharmaceuticals* 660 F 3d 281, 285 (7th Cir 2011).

For Chen:

> The manifest disregard doctrine in theory can be a useful tool to ensure that arbitrators do not act in a manner that is clearly and fundamentally contrary to the law, which should be beyond the powers of any arbitrator.[886]

She does however acknowledge that it provides losing parties with an extra ground for challenging an award, which may increase the cost of arbitration and make the US a less competitively attractive arbitration forum. Because of the disadvantages of allowing a challenge based on legal error, she goes on to argue that the doctrine remains useful in cases of mandatory arbitration, but not in the context of ICA involving sophisticated business parties who freely agree to arbitrate disputes.[887] Whether national laws should allow for an arbitration award to be vacated for legal error remains a controversy and both sides make valid points. One side argues that there is a need to protect parties from a tribunal's egregious failure to apply the law correctly. The other side argues that allowing litigation to vacate an award for legal error undermines the finality and efficiency of arbitration.[888]

In England, the law has the certainty and clarity of a statutory provision. Under s.69 of the English Act, subject to any contrary agreement, a party may apply to the court for review of an award 'on a point of law'. The court will only give leave where the tribunal's decision was 'obviously wrong' or where 'the question is one of general public importance and the decision of the tribunal is at least open to serious doubt'. Furthermore, leave will only be granted where, despite the agreement to arbitrate: 'it is just and proper in all the circumstances for the court to determine the question'.

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[886] Annie Chen, 'The Doctrine of Manifest Disregard of the Law after Hall Street: Implications for Review of International Arbitrations in US Courts' (2009) 32 *Fordham International Law Journal* 1872, 1904.

[887] Annie Chen, 'The Doctrine of Manifest Disregard of the Law after Hall Street: Implications for Review of International Arbitrations in US Courts' (2009) 32 *Fordham International Law Journal* 1872, 1905-1906.

[888] Sandra Tvarian Stevens, 'Judicial Review of Arbitration Awards Before and After Hall Street' (2012) 42 *The Brief* 33, 36.

This is a 'highly restrictive' approach that limits appeals to those awards resulting from a 'misapprehension or misapplication of the law', acknowledging that ordinarily it should be left to the arbitration tribunal, as 'the masters of the facts',[889] to resolve the dispute.[890] The limited scope for challenge is reflected in the findings of a survey of cases between 2009-2013 involving either s.68 or s.69, which found that less than 2% of the 'more than 800 known cases' of arbitration held annually in England resulted in litigation.[891]

The balance of interests reflected in s.69 depends on judicial interpretation and application, which is contingent on the judges' attitude towards arbitration and their willingness to support rather than interfere with the arbitration process. Indeed, by comparison with the traditionally interventionist approach taken, *inter alia*, in Saudi Arabia under the now-repealed SAL 1983, it was observed that:

> what is notable … is the readiness of the English judges to recognise their limited scope of review under s.69 and to respect the parties' choice to submit their dispute to arbitration and the intended finality that flows from that choice.[892]

This supportive attitude is reflected in Thornton J's interpretation of s.69(3)(d), that the court should only give leave to appeal on a point of law where it was 'just and proper in all the circumstances'. He stated:

> the court should take account of, and give weight to, the policy that ordinarily party autonomy should dictate that all questions in

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[889] *Geogas SA v Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd's Rep 215, 228 per Steyn LJ.

[890] *Harvey v Motor Insurers Bureau*, Lawtel transcript, 21 December 2011, [17], [25] (High Court, QBD)

[891] Wendy Miles, Justin Li, 'Do England's expansive grounds for recourse increase delay and interference in arbitration? ' (2014) 80 *Arbitration* 35, 40.

[892] Reza Mohtashami, Merryl Lawry-White, 'Appealing arbitral awards in Arabia: another perspective on section 69 of the English Arbitration Act' (2012) 15 *International Arbitration Law Review* 126, 131.

> dispute, including questions of law, should be decided by the arbitrator.[893]

Thus, '[a]s a matter of general principle, the courts strive to uphold arbitral awards'.[894] Under s.69, then, the court's role is limited to those circumstances where it would be patently unjust or contrary to the public interest to allow the award to stand without review. It strikes a reasonable balance between the state's interest in justice and the value of respecting the autonomy of the arbitration process. Crucially, party autonomy is respected by allowing the parties to exclude judicial review on a point of law through the arbitration agreement.

The English approach has the advantage of providing the opportunity to make an application to the courts while leaving the choice of precluding such an option up to the parties. This achieves a better balance of the interests served by arbitration than does an approach that completely precludes the court from addressing errors of law. While the standard position is to argue that the choice to arbitrate reflects an intention to resolve a dispute exclusively through arbitration, 'it cannot be assumed that every party who elects to go to arbitration necessarily wishes to preclude the possibility of an appeal on a point of law'.[895] Indeed, a ten-year review of the Act, which surveyed 522 respondents, found that 60% supported the retention of s.69.[896] Furthermore, although a minority preference, 17% of respondents in the 2015 survey of ICA

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[893] *HOK Sport Limited (Formerly Lobb Partnership Limited) v Aintree Racecourse Company Limited* [2002] EWHC 3094, [56].

[894] *London Underground Limited v Citylink Telecommunications Limited* [2007] EWHC 1749, [51].

[895] Robert Finch, 'London: still the cornerstone of international commercial arbitration and commercial law' (2004) 70 *Arbitration* 256, 262.

[896] International Dispute Resolution Centre, *Report on the Arbitration Act 1996* (IDRC 2006); Bruce Harris, 'The Arbitration Act 1996 - 10 Years On: Preliminary Observations of a Major Survey of User's Views on the Act' (2006) Working Paper 1, 7 <http://www.biicl.org/files/2126_the_arbitration_act_1996_10_years_on.pdf> accessed 30 November 2017.

highlighted the lack of an appeal mechanism on the merits as one of the three worst features of arbitration.[897]

The value of the English approach is that it reduces injustice and, most importantly, provides parties with the choice of excluding the default right to appeal on a point of law.[898] It could, however, even be argued that, despite preserving the option for legal error review, s.69 is too restrictive, allowing 'erroneous decisions to go uncorrected and inhibit[ing] the development of commercial law'.[899] Regardless of whether English law has achieved an appropriate balance of interests, it at least seems that s.69 has not prevented London from remaining one of the five most popular arbitration seats.[900] This suggests that the approach is acceptable, at least to commercial parties, if not to purists who prefer arbitration to be wholly autonomous.

Turning to the issue of whether parties should be able to expand the scope for review of the award. This raises the question of how much control should the parties be afforded over the arbitration process.[901] If arbitration is conceived of as a wholly autonomous system of private dispute resolution, then this issue should be fully resolved by market mechanics and a respect for party autonomy. The implication of party autonomy, as the 'foundation' of arbitration, is that: 'the parties own the dispute

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[897] School of International Arbitration Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015), 7.

[898] Hew R Dundas, 'Appeals on questions of law: section 69 revitalised' (2003) 69 *Arbitration* 172, 182; Taner Dedezade, 'Are you in? Or are you out? An analysis of section 69 of the English Arbitration Act 1996 - appeals on a question of law' (2006) 9 *International Arbitration Review* 56.

[899] Robert Finch, 'London: still the cornerstone of international commercial arbitration and commercial law' (2004) 70 *Arbitration* 256, 263.

[900] School of International Arbitration Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015), 2.

[901] Mark D Wasco, 'When Less is More: The International Split over Expanded Judicial Review in Arbitration' (2010) 62 *Rutgers Law Review* 599, 608-611.

and should be able to control the details of their disputing process'.[902] It follows from this that the arbitration institutions should allow the parties to determine the balance between, efficiency, legal accuracy and the finality of the award by affording them control over the option of an appeal mechanism.[903] If the demand is there,[904] then it both respects party autonomy and makes commercial sense for arbitration institutions to provide an appeal mechanism, including the option of an appeal on the merits of the tribunal's decision. This assumes, however, that the process of review is managed internally by the arbitration system. Although some international arbitration institutions, such as the European Court of Arbitration,[905] have established internal arbitration appeal mechanisms,[906] arbitration currently still relies substantially on the national legal system to provide access to the courts for review.

The reliance on the national courts for review of the award impacts on the issue for two main reasons. First, the uneasy relationship between arbitration and litigation, coupled with the current emphasis on judicial non-interventionism, creates a pressure on the national legal system to limit the review of the award and to resist any expansion of this restrictive approach. Second, the national legal system is a public institution controlled by government and the public interest, rather than the private interests of the parties to the arbitration. Since the protection of individual rights is a

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[902] Edward Brunet, 'The Core Values of Arbitration' in Edward Brunet, Richard E Speidel, Jean R Sternlight, Stephen J Ware (eds), *Arbitration Law in America: A Critical Assessment* (Cambridge University Press 2006) 3.

[903] Yilei Zhou, 'Breaking the ice in the international commercial arbitration: from the finality of arbitral award to the arbitral appeal mechanism' (2014) 3 *China-EU Law Journal* 289, 297-298.

[904] See the discussion in: Irene M Ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 *International Law and Politics* 1109, 1166-1168. In the 2015 Arbitration Review, 23% of respondents favoured the inclusion of an appeal mechanism on the merits: School of International Arbitration Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015), 8.

[905] See: European Court of Arbitration, *Arbitration Rules of the European Court of Arbitration* (2015), art 28 <http://cour-europe-arbitrage.org/archivos/documentos/192.pdf> accessed 30 November 2017.

[906] Irene M Ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 *International Law and Politics* 1109, 1126; Yilei Zhou, 'Breaking the ice in the international commercial arbitration: from the finality of arbitral award to the arbitral appeal mechanism' (2014) 3 *China-EU Law Journal* 289, 296.

matter of public interest, the extent of that protection is not something that should be left completely to private negotiation. This does not mean that the parties should have no control over the involvement of the court. If party autonomy is a crucial source of the power granted to the arbitration tribunal, then it should also be afforded an appropriate role in defining the nature of the relationship between arbitration and litigation.[907] It does mean, however, that the maximum involvement of the courts is something that should be determined by the government pursuant to its policy goals. Thus, in *Hall Street Associates*, the US Supreme Court emphasised that the FAA implemented national policy, which was reflected in the provisions of the Act that clearly set out the availability of judicial review leaving no scope for expansion through a private contractual agreement.[908]

The state's interest in ensuring that arbitration is a procedurally fair system, means that the parties should not be able to completely preclude a review by the courts. Thus, national law should determine both the maximum and the minimum levels of intervention. This leaves a bounded, but valuable, opportunity for the parties to decide the scope of judicial review and manage the risk of an unjust award, self-determining the balance between efficiency and finality.[909] Under s.69 of the English Act, for example, the parties can apply to the courts for review where there has been a legal error, but that option may be waived through the arbitration agreement. Alternatively, a similar balance of interests may be achieved through an opt-in approach, rather than the opt-out provision of s.69. This is, for example, the approach taken in Hong Kong and provides a more emphatic respect for the process of arbitration reflected in the finality of the award.[910]

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[907] Margaret Moses, 'Can Parties Tell Courts What to Do?' (2004) 52 *Kansas Law Review* 429, 443.

[908] *Hall Street Associates v Mattel, Inc* 552 US 576, 586-590 (2008).

[909] Karon A Sasser, 'Freedom to Contract for Expanded Judicial Review in Arbitration Agreements' (2000) 31 *Cumberland Law Review* 337, 356-357.

[910] Wendy Miles, Justin Li, 'Do England's expansive grounds for recourse increase delay and interference in arbitration? ' (2014) 80 *Arbitration* 35, 47.

How far the courts should be involved in reviewing arbitration awards depends on how one conceives the system of arbitration and its relationship to litigation. While a fully autonomous system of arbitration is the ideal, a hybrid system is more consistent with arbitration in practice. The reliance on the national legal system to facilitate the arbitration process and enforce the award, provides the courts with the justification and opportunity to provide the parties with a measure of public protection to ensure that the arbitration process is at least minimally just. The international trend is for any judicial review to be limited to issues of procedural justice. Some jurisdictions, however, also allow judicial review on points of law. Thus, with the precise scope of the review dependent on the jurisdiction, the parties have the option of applying to a national court of the seat to have the arbitration award set aside or varied.[911]

5.5 Enforcement and the NY Convention

As an alternative to challenging the award in the place of arbitration, a losing party may also seek to prevent the award being enforced.[912] Enforcement of an ICA award is subject to the provisions of the NY Convention, which was developed in response to the demand for cross-border enforceability of arbitration awards that accompanied the growth of global commerce and transnational contracts.[913] For Slate: '[t]he singular importance of the New York Convention cannot be overstated'.[914] He further explains that: '[t]he proverbial bottom line here is that millions of business agreements, worldwide, rely upon the enforceability of an international award promised in the New York Convention'.[915]

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[911] English Act, s 69(7).

[912] Martin Platte, 'An Arbitrator's Duty to Render Enforceable Awards' (2003) 20 *Journal of International Arbitration* 307, 311.

[913] Sundaresh Menon, 'The Transnational Protection of Private Rights' in David D Caron, Stephan W Schill, Abby Cohen Smutny, Epaminontas E Triantafilou (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 17, 23-24.

[914] William K Slate II, 'Why International Commercial Arbitration' (2002) 69 *Vital Speeches of the Day* 82.

[915] William K Slate II, 'Why International Commercial Arbitration' (2002) 69 *Vital Speeches of the Day* 82, 83.

The importance of the NY Convention flows from its instrumental role in achieving harmonisation and effective enforcement, which are two of the main characteristics that make ICA an attractive option.[916] Its importance has increased since its inception in 1958, which is evidenced by the growing reliance on the NY Convention in cases brought before the courts. In a survey of US case law, Strong noted that between 1970-1979, US federal courts referred to the NY Convention in 30 decisions. By the 2000-2009 period, this had risen to 544 decisions. The trend continued in 2010-2011 and a similar trend is apparent in the UK.[917]

The impact of the NY Convention is such that Redfern, who acknowledges its 'great significance' as the 'foundation stone of modern international arbitration', is plausibly able to claim that: '[i]f parties are looking for a binding and enforceable decision on an international dispute, to be given by a neutral and independent tribunal, then international arbitration is "the only game in town"'.[918] Indeed, its ongoing significance is both recognised and ensured by the number of countries, which currently stands at 157, that have become parties to the NY Convention. This includes both Scotland, as part of the UK, and Saudi Arabia, which signed and ratified the Convention in 1994.[919] Because both Saudi and Scotland are parties to the NY Convention, it is worth considering its main provisions before addressing the domestic law of those two countries.

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[916] Mark D Wasco, 'When Less is More: The International Split over Expanded Judicial Review in Arbitration' (2010) 62 *Rutgers Law Review* 599, 606-607.

[917] S I Strong, 'Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration' (2012) 1 *Journal of Dispute Resolution* 1, 2, 5.

[918] Alan Redfern, 'The Changing World of International Arbitration' in David D Caron, Stephan W Schill, Abby Cohen Smutny, Epaminontas E Triantafilou (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 45, 47, 48.

[919] UNCITRAL, Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 30 November 2017; UN, Treaty Collection: Chapter XXII Commercial Arbitration, 1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en> accessed 30 November 2017.

The NY Convention creates a 'strong presumption in favour of enforcement',[920] that applies, under article I, to all foreign and non-domestic awards. The scope of this latter type of award is determined by the state in which enforcement is sought and may include those awards made in the enforcement state: under a foreign law; where there is a foreign or international element; or where the arbitration was not governed by national law.[921] Under article I(3), recognition and enforcement may be reciprocally restricted to those awards rendered by other parties to the convention. Subject to subsequent provisions, article III requires contracting states to: 'recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon ...'

Despite the presumption in favour of enforcement, the NY Convention allows contracting state parties the discretion to refuse recognition and enforcement where the award satisfies one of the seven exhaustive grounds for refusal set out in article V. Under article V, enforcement 'may be refused' where: the original arbitration agreement was invalid under the national relevant law; the arbitration process breached the natural justice requirements that parties are given adequate notice and opportunity to present their case; the arbitration tribunal exceeded its jurisdiction; the tribunal composition or procedure was not consistent with the arbitration agreement or the national law; the award has been vacated; the subject matter is not arbitrable in the country where enforcement is sought; enforcement 'would be contrary to the public policy of that country'.

It should be noted that these grounds cover jurisdictional errors, procedural flaws and matters of public policy, but do not allow refusal for errors of fact or law. In other words, there is no jurisdiction to refuse enforcement based solely on substantive

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[920] Margaret Moses, 'Can Parties Tell Courts What to Do?' (2004) 52 *Kansas Law Review* 429, 457.

[921] Albert Jan Van Den Berg, 'The New York Convention of 1958: An Overview' (2008) in Emmanuel Gaillard, Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitration Awards: The New York Convention in Practice* (Cameron May 2008) 39, 40-42.

injustice or the merits of the case. The substantive elements of the case are relevant only insofar as they are evidence that the tribunal exceeded its authority.

It should also be noted that the consequence of a refusal of recognition does not mean that the award has been set aside. The effect of the court's judgment is restricted to its own jurisdiction and the affected party may still seek enforcement of the award in another jurisdiction. Indeed, one of the features of, or issues with, the NY Convention is that it allows the moving party to initiate actions simultaneously, or sequentially, in multiple courts.[922] Since one of the grounds for refusal of enforcement is the fact that the award has been vacated by the national courts of the country in which the award was rendered, the distinction between vacatur and a refusal of enforcement is crucial. Unlike a refusal of enforcement, the effect of vacatur extends beyond the jurisdiction of the court that sets aside the award. Controversially, however, article VII of the NY Convention allows a party to seek enforcement of an award vacated by the jurisdiction in which the award was rendered.[923] Since, under article V, the refusal of enforcement is discretionary,[924] the door is left open for a national court of the state where enforcement is sought to enforce an award that has been vacated by the foreign court.[925]

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[922] S I Strong, 'Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration' (2012) 1 *Journal of Dispute Resolution* 1, 15.

[923] Margaret Moses, 'Can Parties Tell Courts What to Do?' (2004) 52 *Kansas Law Review* 429, 460.

[924] For a critical analysis of the meaning of discretion in relation to art 5 of the NY Convention, see: Jonathan Hill, 'The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958' (2016) 36 *Oxford Journal of Legal Studies* 304.

[925] See, eg, *Pabalk Ticaret Limited Sirketi v Norsolor SA*, ICCA Yearbook Commercial Arbitration XI (1986) 484 (Cour de Cassation, France, 9 October 1984); *Chromalloy Aeroservices v Arab Republic of Egypt* 939 F Supp 907 (1996); Linda Silberman, 'The New York Convention After Fifty Years' (2009) 38 *Georgia Journal of International & Comparative Law* 25, 28-32; Faizal Kurniawan, 'An Annulled Award Cannot be Enforced Under the New York Convention' (2017) 17 *Jurnal Dinamika Hukum* 171, 176-178.

5.5.1 The NY Convention and the public policy exception

One of the criticisms levied at the NY Convention is that it allows national courts to favour state owned, or even local, companies over foreign parties. This bias, evidence of which may be found in the experience of seeking enforcement in Russia,[926] is facilitated by allowing public policy as a ground for refusing to enforce an award.[927] Glusker highlights, in particular, the 'notorious case' of *United World Ltd v Krasny Yakor*, in which the court of cassation refused to enforce an award on the "public policy" grounds that 'it would lead to Red Anchor's bankruptcy and consequently adversely affect the regional economy and the Russian Federation as a whole'.[928]

The problem with the concept of public policy is that it is inherently vague and difficult to define, which allows states to protect interests central to their identity, while preventing its misuse to protect its economic interests. Given its importance to national sovereignty, however, it is unlikely that any reform of the NY Convention would remove the public policy exception.[929] Despite the possibility for abuse, and the Russian experience, the public policy (and arbitrability) exceptions, as Gaillard claims, 'have not created great disharmony where one might have thought they would'.[930]

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[926] Elliot Glusker, 'Arbitration Hurdles Facing Foreign Investors in Russia: Analysis of Present Issues and Implications (2010) 10 *Pepperdine Dispute Resolution Law Journal* 595, 605-611.

[927] Emmanuel Gaillard, 'The Urgency of Not Revising the New York Convention' in Albert Jan Van Den Berg (ed) *Fifty Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009) 689, 690-691.

[928] Elliot Glusker, 'Arbitration Hurdles Facing Foreign Investors in Russia: Analysis of Present Issues and Implications (2010) 10 *Pepperdine Dispute Resolution Law Journal* 595, 607, referring to *United World Ltd v Krasny Yakor* (Pan v Russ) Fed Com Ct of Volga-Vyatka Cir, Case no A43-10716/02-27-10isp (2003).

[929] Emmanuel Gaillard, 'The Urgency of Not Revising the New York Convention' in Albert Jan Van Den Berg (ed) *Fifty Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009) 689, 691.

[930] Linda Silberman, 'The New York Convention After Fifty Years' (2009) 38 *Georgia Journal of International & Comparative Law* 25, 27.

The relatively harmonious application of the public policy exception is perhaps a consequence of the national courts' willingness to rely on the spirit of the NY Convention when interpreting its provisions. In *Parsons & Whittemore v Societe Generale De L'Industrie Du Papier (RAKTA),* for example, the US Court of Appeals (2nd circ) looked to the history of the NY Convention, which reflected a pro-enforcement bias. The court relied on this to argue that: the defence should be 'construed narrowly', with enforcement denied: 'only where enforcement would violate the forum State's most basic notions of morality and justice'.[931] From the perspective of an Islamic country, such as Saudi Arabia, this crucially allows the public policy exception to apply where the award contravenes the *Sharia*. This is similarly illustrated by the approach of the Tehran Court of Appeal, which refused to enforce the part of an award that ordered the payment of compound interest. This was deemed to be *riba*, which is forbidden by *Sharia* and so was considered contrary to Iranian public policy.[932]

5.6 The Law Governing the Arbitration Award and Recourse Against the Award

5.6.1 Interim measures and preliminary orders

While the focus of this analysis is on the final award, it should first be noted that the Model Law, under article 17 and articles 17A to G, allows the tribunal, unless precluded by the parties' agreement, to grant interim measures and preliminary orders. Under article 17J, the national court is similarly afforded the power to grant interim measures. An interim measure is defined as 'any temporary measure' granted prior to the final award with the intention of preserving evidence and/or assets.[933] They must be enforced by the court unless one of the grounds under article 17I is satisfied.[934]

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[931] *Parsons & Whittemore v Societe Generale De L'Industrie Du Papier (RAKTA)* 508 F 2d 969, 973-974 (1974).

[932] Tehran Court of Appeal (Chamber 15), Judgment 559, 19 July 2005, discussed in: Hossein Abedian, 'Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review' (2011) 28 *Journal of International Arbitration* 553, 580.

[933] Model Law, article 17.

[934] Model Law, article 17H.

These are the same as for final awards, with additional grounds that are specific to interim measures. These are: that the security conditions attached to the measure have not been complied with; that the interim measure has been suspended or terminated; or that the 'interim measure is incompatible with the powers conferred upon the court'. The court has no power to 'review ... the substance of the interim measure'.[935]

In support of an application for an interim measure, article 17B allows the applicant to request a preliminary order 'directing a party not to frustrate the purpose of the interim measure'. Like the power to award an interim measure, the power to grant a preliminary order may be precluded by the parties' agreement. While a preliminary order is binding, it is not considered an award and is not enforceable by a court.[936]

From a procedural justice perspective, article 17C requires that the other party be notified and given the opportunity to be heard and raise objection. To avoid any substantive injustice, article 17D allows the interim measure and preliminary order to be modified, suspended or terminated. Furthermore, the applicant is under an ongoing obligation to disclose any relevant matters to the tribunal,[937] may be required to provide 'appropriate security',[938] and may subsequently be ordered to pay costs and damages: 'if the tribunal later determines that, in the circumstances, the measure or the order should not have been granted'.[939]

While using a different terminology, the SAR provide for a default power allowing the tribunal to 'make a provisional award granting any relief on a provisional basis

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[935] Model Law, article 17I(2).

[936] Model Law, article 17C(5).

[937] Model Law, article 17F.

[938] Model Law, article 17E.

[939] Model Law, article 17G.

which it has the power to grant permanently'.[940] This includes the power to 'order a party to refrain from doing something',[941] which, as with the Model Law, allows the tribunal to preserve evidence or assets to ensure justice at the enforcement stage and a meaningful final award. As with the Model Law, this is supported by the courts' power to grant interdict or 'any other interim or permanent order'.[942] The parties must be formally notified of any provisional award.[943] Perhaps the only significant difference between the two approaches is that the Model Law distinguishes between interim measures, which are enforceable by a court, and preliminary orders, which are not. Under the SAR, however, there is no such distinction, with provisional orders characterised as provisional awards, making them enforceable by the courts.[944]

Turning to the SAL 2012, which provides for provisional remedies under articles 22 and 23. Under article 23, the parties are free to agree that that the tribunal may make a provisional or conservatory order, if so requested by one of the parties. Under article 22, any of the parties may apply to the court before the arbitration proceedings have commenced for an order for provisional or conservatory measures. The arbitration tribunal may also make an independent application to the court for a provisional measures order at any point during the proceedings. This latter power is presumably contingent on the parties' agreeing, under article 23, that the tribunal may make provisional or conservatory orders at the request of one of the parties.

These two articles provide far less detail than the Model Law regarding the nature of the provisional measures. Under article 23, the tribunal is simply granted the discretionary power to make whatever measures are 'appropriate, with regard to the nature of the dispute'. This lack of detail allows more discretion than under the Model

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[940] SAR, r 53.

[941] SAR, r 49.

[942] SAR, r 46.

[943] SAR, r 51(3), r 83.

[944] But see also the availability of tribunal directions under rule 31.

Law provisions, which require that any such interim measures are justified by a harm-benefit analysis and that: 'There is a reasonable possibility that the requesting party will succeed on the merits of the claim'.[945] In this regard, the approach under the SAL 2012 is closer to the approach under the Scottish Act, which affords the tribunal the power to make any award on a provisional basis that it has the power to make as a final award.

Articles 22 and 23 of the SAL 2012 'represent a significant liberalization' of the approach under the SAL 1983, making the Saudi arbitration regime more consistent with the current international approach.[946] By allowing the parties to control whether provisional measures should be available, the SAL 2012 respects party autonomy. It is, however, unfortunate that it makes no formal provision for notification or the opportunity to object to the measures. It may, nevertheless, be argued that article 27, which requires equal treatment and the 'full opportunity' to present their case, obliges the tribunal to allow the parties to object to a provisional measure. Finally, articles 22 and 23, while liberalising the law, suffer from a lack of clarity that could be improved by redrafting the provisions, particularly regarding the relationship between the tribunal's powers under the two articles.

5.6.2 The nature and form of the final arbitration award

In resolving the dispute and making the final award, article 28 of the Model Law requires the tribunal to respect party autonomy. The tribunal must apply the rules of law as chosen by the parties, which may not be limited to the rules of a single legal system.[947] The decision must also be 'in accordance with the terms of the contract'. This respect for party autonomy is further emphasised by the condition that the tribunal may decide '*ex aequo bono* or as an *amiable compositeur*' only if 'expressly

[945] Model Law, article 17A.

[946] Jean-Pierre Harb, Alexander G Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 *Journal of International Arbitration* 113, 119.

[947] Gerold Herrmann, 'UNCITRAL's Work Towards a Model Law on International Commercial Arbitration' (1984) 4 *Pace Law Review* 537, 558.

authorized' by the parties. Furthermore, the tribunal must consider any 'usages of the trade applicable to the transaction'. While not strictly reflecting a respect for party autonomy, this provision is nevertheless consistent with such a respect since it relies on the norms of trade practice and published principles of good practice,[948] which are likely to coincide with the expectations of the parties.

In the interests of cost-effectiveness, the tribunal may choose the applicable law, through conflict-of-law rules, where the parties have failed to specify it.[949] Also in the interests of cost-effectiveness, article 29 of the Model Law provides that the tribunal decision will be valid if agreed by a majority of the tribunal. This is subject to any contrary agreement of the parties, which ensures that party autonomy remains the dominant concern. Similarly, cost-effectiveness is enhanced by allowing that purely procedural issues may be determined by a presiding arbitrator, but only 'if so authorized by the parties or all members of the arbitral tribunal'.

Although not defined by the Model Law, the Ontario Court of Appeal defined a final award as 'the judgement or order of an arbitral tribunal that "disposes of part or all of the dispute between the parties"'.[950] The Model Law allows final awards to be made either on the basis of the tribunal's decision or, under article 30, as a consent award to implement the terms of a settlement agreed by the parties. Where the award is based on the parties' settlement, the tribunal may only record it as an award if so requested by the parties. As such, article 30 both respects party autonomy and provides a

[948] Federal Supreme Court, Switzerland, 16 December 2009, Decision 4A_240/2009, (2011) 30 ASA Bull 457. The court held that it was appropriate for the tribunal to rely on the UNIDROIT Principles of International Commercial Contracts 2004.

[949] Model Law, article 28.

[950] *Inforica Inc v CGI Information Systems and Management Consultants Inc* (2009) ONCA 642, [29].

mechanism for ensuring that any such settlement, assuming it is properly recorded,[951] will acquire the status of an arbitration award and be enforceable by national courts.[952]

Article 31 of the Model Law sets out the *ex ante* formal requirements for the validity of the final award. It must be in writing and signed by the majority of the tribunal, which provides evidentiary certainty where the award is subsequently challenged. Subject to any contrary agreement between the parties, the tribunal's reasons must be stated, but the Model Law is silent on the scope of this duty. It is arguable, however, that the arbitrator's duty should be less demanding than the obligation on a judge to explain a judicial decision.[953] Arbitration is of a fundamentally different nature to litigation and the extent of the duty should be limited by the balance between justice and those of cost-effectiveness. Thus, as the New South Wales' Court of Appeal observed, the arbitrators should not be required to set out a full explanation of how they reached their decision, but should provide a '[crisp summary] statement of factual findings and legal or other reasons' for the award.[954] This requires the reasons, but not necessarily the reasoning, for an award.

The extent of the explanation required depends on the complexity of the case,[955] but any obligation to provide complete reasons may be balanced against the value of achieving finality in the award. Thus, the Swedish Supreme Court explained that,

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[951] Oberlandesgericht Frankfurt aM, Germany, 3 Sch 01/99, 28 June 1999 <http://www.disarb.de/en/47/datenbanken/rspr/olg-frankfurt-am-case-no-3-sch-01-99-date-1999-06-28-id49> accessed 30 November 2017; Oberlandesgericht Frankfurt aM, Germany, 20 Sch 01/02, 14 March 2003 <http://www.disarb.de/en/47/datenbanken/rspr/olg-frankfurt-am-case-no-20-sch-01-02-date-2003-03-14-id240> accessed 30 November 2017.

[952] Yaraslau Kryvoi, Dmitry Davydenko, 'Consent Awards in International Arbitration: From Settlement to Enforcement' (2015) 40 *Brook Journal of International Law* 827, 835.

[953] But see: *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255 (Australia).

[954] *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57 (Australia), [218-220]. See also: *Bremer Handelsgesellschaft mbH v Westzucker GmbH* (No 2) [1981] 2 Lloyd's Reports 130, 132-133; *Bay Hotel and Resort Ltd v Cavalier Construction Ltd* [2001] UKPC 34, [25].

[955] *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37 (Australia), [53]; Geoff Farmsworth, 'Sufficiency of Reasons in Arbitration Awards' (2012) 26 *Australian and New Zealand Maritime Law Journal* 69, 72, 75.

while the obligation served as 'a guardian of the rule of law', an award would only be vacated where there was 'a total lack of reasons, or reasons that are so lacking that they can be equated to a total lack of reasons'.[956] However, the reasons must make sense and be consistent with the decision, supporting it without contradiction.[957]

As discussed earlier, the obligation to provide reasons derives from the arbitrator's duty to make an award that accurately reflects the correct application of the law to the circumstances of the case. While a reasoned award may provide the information necessary for an appeal on a matter of law,[958] the duty has a wider significance. The Model Law precludes judicial review on the merits of the case, which makes the duty to give reasons particularly significant as a way of demonstrating the justice of the decision.[959] An obligation to give reasons reinforces the legitimacy of the arbitration process as a rational mechanism for resolving disputes,[960] serves to guard against arbitrary decision-making and mitigates any sense of injustice from an unwelcome decision.[961] As the Victoria Supreme Court explained, the obligation:

> is grounded in the notion that justice should not only be done but be seen to be done ... deriv[ing] from the fundamental conception

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[956] Case No T4387-07, *Soyak International Construction & Investment Inc v Hochtief AG*, 31 March 2009, Stockhokm, Swedish Supreme Court, translation from <http://www.arbitration.sccinstitute.com> accessed 30 November 2017. Sweden did not implement the Model Law, but it did provide an important 'source of inspiration' for the Swedish Arbitration Act 1999, see: Harald Nordenson, Marie Ohrstrom, 'Arbitration in Sweden' in Torsten Lorcher, Guy Pendell, Jeremy Wilson (eds) *CMS Guide to Arbitration*, vol 1, (4th edn, CMS Legal 2012) 845, 847.

[957] CLOUT case No 569, Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 01/01, 8 June 2001 <http://www.disarb.de/de/47/datenbanken/rspr/hanseat-olg-hamburg-az-11-sch-01-01-datum-2001-06-08-id1274> accessed 30 November 2017.

[958] *Trave Schiffartsgesellschaft mbH v Ninemia Maritime Corporation* [1986] QB 802, 807 per Sir John Donaldson MR.

[959] Peter Gillies, Niloufer Selvadurai, 'Reasoned Awards: How Extensive Must the Reasoning Be?' (2008) 74 *Arbitration* 125, 126.

[960] *Trave Schiffartsgesellschaft mbH v Ninemia Maritime Corporation [*1986] QB 802, 808 per Sir John Donaldson MR; SI Strong, 'Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy' (2015) 37 *Michigan Journal of International Law* 1, 20.

[961] Lord Justice Bingham, 'Differences Between a Judgment and a Reasoned Award' (1988) 16 *Arbitration International* 141.

> of fairness that a party should not be bound by a determination without being apprised of the basis on which it was made.[962]

The award is treated as the final resolution of the dispute,[963] which means 'all matters that the arbitral tribunal was expected to decide',[964] so terminating the proceedings and the tribunal's mandate. This, however, does not preclude the correction of errors in the award.[965] The power to correct a mistake in the award is not subject to the parties' agreement, although the parties may vary the thirty-day limitation period. Within that period, the parties may request the tribunal to explain a specific point or correct a mistake in the award, which prevents the award from becoming binding until the matter is resolved.[966] Any interpretation provided by the tribunal becomes part of the award, which makes it part of the substance of the award and not open to subsequent judicial review. The tribunal may also correct errors on its own initiative. In neither case may the award be recalled, reversed or revised by the correction of substantive errors of judgment.[967] Reflecting the finality of the decision, the power to correct the award is restricted to 'errors in computation, any clerical or typographical errors or any errors of a similar nature',[968] which includes errors of omission, drafting, and calculation.[969]

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[962] *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255 (Australia), [56].

[963] Model Law, article 32.

[964] *Tang Boon Jek Jeffrey v Tan Poh Leng Stanley* [2001] 3 SLR 237 (CA, Singapore).

[965] Model Law, article 33.

[966] CLOUT case No 625, *Relais Nordik Inc v Secunda Marine Services Limited and Anor,* Federal Court, Canada, 12 April 1990.

[967] CLOUT case No 207, Arb no 6 of 1996, 6 February 1998, Singapore International Arbitration Centre; *Tan Poh Leng Stanley v Tang Boon Jek Jeffrey* [2001] 1 SLR 624.

[968] Model Law, article 33(1)(a).

[969] CLOUT case No 625, *Relais Nordik Inc v Secunda Marine Services Limited and Anor,* Federal Court, Canada, 12 April 1990; CLOUT case No 267, *Zimbabwe Electricity Supply Commission v Genius Joel Maposa,* Harare High Court, Zimbabwe, 29 March and 9 December 1998.

The tribunal may also, subject to any contrary agreement between the parties, respond to a request from one of the parties 'to make an additional award as to claims presented in the arbitral proceedings but omitted from the award'.[970] This power provides a substantive justice safeguard to ensure all claims are resolved. Again, the time limit is thirty days, which does not unduly interfere with the finality of the original award. It does, however, seem inconsistent with the absence of any power to correct substantive errors within the same limited period.

Turning to Scots law, r.47(1) of the SAR respects party autonomy by requiring the tribunal to resolve the dispute: 'in accordance with - (a) the law chosen by the parties as applicable to the substance of the dispute'. Under r.47(2), the parties may also agree that the tribunal should resolve the dispute based on 'general considerations of justice, fairness or equity'. In resolving the dispute, the tribunal must consider: relevant contractual provisions; 'normal commercial or trade usage' to aid interpretation of the contract; 'established commercial or trade customs'; and 'any other matter which the parties agree is relevant in the circumstances'.[971] While not identical, this is consistent with the approach under article 28 of the Model Law, except that article 28 refers to the 'rules of law' rather than the law. As noted above, this means that the parties are not restricted to choosing the rules of law from a single jurisdiction. By referring to ‘the law chosen’, rather than the ‘rules of law’, it appears that the SAR do not afford the parties the same freedom. It should be noted, however, that r.47 is a default rule and so may be excluded by the parties.

Like the Model Law, the approach under the SAR is not just about party autonomy, but also addresses the need for cost-effectiveness. Thus, like article 28(2), r.47(1)(b) of the SAR allows the tribunal to determine the applicable law where the parties have failed to decide. The SAR also provide, under r.30, for how the award should be determined where the tribunal are not unanimous. This includes allowing a majority

[970] Model Law, article 33(3).

[971] SAR, r 47(3).

decision or, where there is no majority, by the nominated chair, the last arbitrator appointed or an appointed umpire.

The SAR provides a more comprehensive framework than the Model Law, resolving any issues where a tribunal is comprised of an even number of arbitrators who are unable to make a majority decision. While in most cases the Model Law and SAR will function similarly, the SAR have usefully closed the lacuna left by the Model Law. Under article 10, the Model Law allows the tribunal to be comprised of an even number of arbitrators, but provides no mechanism for dealing with cases where such a tribunal is unable to make a majority decision. The approach under r.30, then, provides a framework that more completely ensures a cost-effective process. By relying on a default rule that may be varied or excluded, party autonomy is also respected.

Like the Model Law, the Scottish Act does not formally define an award, but a definition may be derived from the provisions of the SAR. As with article 32 of the Model Law, r.57 provides that the arbitration process is terminated by the final or 'last award'. Like article 30 of the Model Law, r.57(3) allows for the termination of the proceedings where the parties settle the dispute, and that settlement may be formalised as an enforceable award.[972] While the Model Law is silent on type of remedies that may be awarded, the SAR mandate a monetary award, including payment for damages,[973] and the payment of interest.[974] Other remedies, which are subject to the parties' agreement, allows the tribunal to make: a declaratory order; an order for performance or non-performance; or an order to rectify or reduce any deed or other document.[975]

[972] SAR, r 57(4).

[973] SAR, r 48.

[974] SAR, r 50.

[975] SAR, r 49.

Like the Model Law, the default r.83 treats the award as a formal communication, requires it to be in writing, signed by all assenting arbitrators,[976] and formally delivered to the parties. Subject to the agreement of the parties, any award made under the Scottish Act is be treated as an award made in Scotland,[977] which means that it may only be set aside by a Scottish court. Under mandatory r.54, the tribunal may make the award in whole or in parts. Furthermore, subject to the parties' agreement, the tribunal may issue a draft award, allowing the parties to make representations regarding the draft, which must be considered by the tribunal within a time limit set as part of the draft award process.[978]

The draft award facility, which is not available under the Model Law, should alert the tribunal to potential issues before the award is finalised. This allows the tribunal to resolve those issues, avoiding a subsequent challenge. While it may slightly prolong the arbitration process, that delay is more than offset by the advantage of greater certainty regarding the finality of the award. Where a subsequent challenge is avoided, then cost-effectiveness is enhanced. Furthermore, allowing the parties to be engaged in the drafting process respects their autonomy and may improve the accuracy of the final award.

Like article 31(2) of the Model Law, r.51 requires the tribunal to give reasons for the award. The duty was clarified in *Arbitration Application 1 of 2013*, in which Lord Woolman took a pragmatic approach, explaining: 'The nature and length of the reasons ... depend upon the whole context'. Providing the reasons are 'sufficient to explain the conclusion', they need only 'deal with the essential issues, not every point'.[979] This duty is a default rule, which may be excluded by the parties' agreement. If, however, the parties chose to disapply the rule, then this will also 'exclude the

[976] SAR, r 51.

[977] SAR, r 52.

[978] SAR, r 55.

[979] *In Arbitration Application 1 of 2013* [2014] CSOH 83, [23-24].

court's jurisdiction to consider a legal error appeal'.[980] Without undermining the wider significance of the obligation to give reasons, this makes explicit the connection between the duty and the ability of the court to assess the merits of the award.

Subject to the contrary agreement of the parties, r.58 affords the tribunal 'significant' power to correct an award,[981] either on its own initiative or following an application by one of the parties, which must be made within 28 days of the final award. As with the Model Law, the corrections are restricted to formal rather than substantive errors. Thus, the tribunal cannot revise the award, but for procedural compliance may correct clerical errors, typographical errors and errors of omission. It may also modify the wording to 'clarify or remove any ambiguity in the award'. The 28-day time limit relates to the 30 days under the Model Law, limiting any impact on the efficiency of the process. Unlike the Model Law, however, r.58(5) requires that the tribunal gives the parties 'a reasonable opportunity to make representations about the proposed correction'. This serves the natural justice duty that obliges the tribunal to ensure that each party has a fair opportunity to be heard and may reduce the risk that the award will subsequently be challenged by a party objecting to the corrections.

Turning to the SAL 2012. Article 38 effectively implements article 28 of the Model Law. Although using different wording and structure, the substance of the provisions is the same except in two matters. First, article 38(1) imposes an obligation on the tribunal to ensure that the arbitration proceedings and award will not contravene *Sharia* or Saudi public policy. This constrains, but is consistent with the arbitrators' duty to do what is reasonable to ensure an enforceable award. The content of that duty is determined by the grounds available for challenge. As such, article 38(1) usefully clarifies part of that duty, but does not extend it.

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[980] SAR, r 69(2).

[981] *In Arbitration Application 1 of 2013* [2014] CSOH 83, [15].

Second, in addition to considering trade usages when issuing an award, the tribunal is also required, under article 38(1)(c), to consider the 'practice and the previous dealings between the parties'. This reflects what the parties might reasonably expect and may be useful to the tribunal when tailoring the award to all the circumstances of the case. It is, however, less respectful of party autonomy than r.47(3)(d) of the SAR, which allows the parties to agree on 'any other matter ... relevant in the circumstances'. This could include their previous dealings, but leaves the choice with the parties rather than the tribunal.

As with both the Model Law and the SAR, article 39 of the SAL 2012 provides that an award may be rendered by a majority. It differs, however, in being a mandatory rule. As with most choices regarding arbitration rules, this engages a balancing of interests and values. On the one hand, making the rule mandatory reduces the flexibility of the process and is less respectful of party autonomy. On the other hand, the mandatory rule is clear and certain, ensuring an efficient decision-making process and reducing the risk of subsequent challenge where the process varied from the arbitration agreement.

Usefully, article 39(2) provides that an umpire may be appointed to resolve a decision where there is no majority. This has a 15-day time limit, which should prevent unnecessary delays, so serving the interests of efficiency. As noted above, r.30 of the SAR also provides a mechanism to resolve the tribunal's failure to reach a majority decision, which fills the lacuna under the Model Law. Article 39(2) of the SAL 2012 has the advantage of simplicity and clarity over r.30. Rule 30, however, avoids the need to appoint an external umpire except in the limited circumstances of a two-arbitrator panel without a nominated chair. This should make the process more efficient, in most cases, under the SAR.

The exception to majority decision-making is where the tribunal has been authorised, under article 39(4), to resolve the dispute equitably as an *amiable compositeur*.[982] In such a case, the award must be unanimous. Neither under the Model Law nor the SAR, was it considered necessary to draw this distinction. Regardless of the other constraints on the arbitrators, relying on equity and fairness may increase the risk of arbitrary decision-making, which may be counterbalanced by requiring a unanimous decision. The problem with the SAL 2012, however, is not that it requires a unanimous decision, but that it provides no a mechanism for resolving a failure of the tribunal to reach unanimity. This is a lacuna that needs to be closed.

Following the Model Law, there is no formal definition of an arbitration award, which may, under article 39(5), be rendered as interim or partial awards in anticipation of the final award. As with both the Model Law and the SAR, the proceedings and the tribunal's mandate are terminated by the final award.[983] The SAL 2012 also follows the Model Law by allowing the tribunal to formalise, as an award, a settlement between the parties.[984] Under article 52, these final awards are considered *res judicata* and enforceable by the courts.[985] This encourages a pro-arbitration attitude, limits the courts' involvement and greatly simplifies the arbitration process since the award no longer needs to be approved by the competent court as was the case under the SAL 1983.[986]

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[982] For a discussion of what it means to resolve a dispute by amiable composition, see: Mark Hilgard, Ana Elisa Bruder, 'Unauthorised Amiable Compositeur?' (2014) 8 *Dispute Resolution International* 51, 51-54.

[983] SAL 2012, article 41.

[984] SAL 2012, article 45.

[985] *Janoup Al Jazira v Assim Arab Centre for Environmental Consultations* (2017 (09/07/1438))) Case no 38249619, Riyadh Court of Appeal.

[986] Faris Nesheiwat, Ali Al-Khasawneh, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia' (2015) 13 *Santa Clara Journal of International Law* 443, 461-462.

Following article 31 of the Model Law, article 42 of the SAL 2012 requires the award to be written and signed by a majority of tribunal members, with the reasons for any non-signatories to be recorded. The SAL 2012 also requires the tribunal to provide the reasons for the award. As discussed previously, this serves the interests of justice, enhancing the legitimacy and integrity of arbitration as a rational, non-arbitrary, dispute resolution mechanism. Unlike the Model Law, or the approach under the SAR, article 42 of the SAL 2012 is mandatory, prioritising certainty and justice over flexibility and party autonomy.

In the interests of efficiency, and to ensure the procedural and natural justice requirement of equal treatment, article 43 of the SAL 2012 requires the tribunal to deliver the arbitration award to all parties within 15 days. It must not publish any part of the award without the parties' written consent. It must also deposit a copy of the award with the competent court. The time limit, which is not required by the Model Law, should reduce delays and the publication restrictions protect the confidentiality of the award and party autonomy. Requiring a copy of the award to be deposited with the court goes beyond both the Model Law and Scottish Act. It may make any subsequent challenge to the award more efficient, but is otherwise of little consequence.

Following article 33 of the Model Law, article 46 of the SAL 2012 allows the parties to request an interpretation of the award, article 48 allows omissions to be rectified through an additional award and article 47 allows the award to be corrected, either on the tribunal's initiative or following a request from one of the parties. Under article 47, the 30-day time limit imposed by the Model Law is reduced to 15 days, which is also shorter than the 28 days allowed by the SAR. Differing from the Model Law and the SAR, this time limit is not subject to the parties' agreement, which restricts the flexibility of the process, prioritising certainty and efficiency over party autonomy. Article 47(2) of the SAL 2012 also explicitly states that if the tribunal exceeds its powers of correction, then the award may be nullified under articles 50 and 51. While this makes explicit the consequences for unauthorised corrections, it does not vary the substantive approach under the Model Law since article 24(2)(a)(iv) allows an

award to be challenged where the arbitration procedure was not in accordance with the parties' agreement or governing law.

5.6.3 Vacating the award

Under the Model Law, a party may apply to the court of the state in which an award was rendered to have the award set aside. To constitute an award that may be set aside by the court, the tribunal's decision must be a final disposition regarding the merits of the case, rather than an interim measure of protection or a procedural order.[987] An award will only be set aside, in whole or in part,[988] if the tribunal's decision offends one of the grounds exhaustively listed under article 34(2).[989] These grounds are intended to ensure an approach that is consistent with the NY Convention.[990] This has the advantage of international harmonisation by ensuring a coherent and consistent approach, regardless of whether the challenge is against the award itself or its enforcement.

As a safeguard for procedural justice, the Model Law provides four grounds that may be relied on by the party making an application to the court.[991] These are: where the agreement is invalid under the relevant national law or due to an incapacity of one of the parties; where natural justice has been breached by the failure to give adequate notice or provide the party with an opportunity to be heard; where the arbitrators have exceeded their jurisdiction under the arbitration agreement; and where the tribunal

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[987] *The Gazette, Une division de Southam inc v Rita Blondin* [2003] RJQ 2090; [2003] CanLII 33868, [48] (Quebec CA, Canada).

[988] *United Mexican States v Metalclad Corp* (2001) 89 BCLR (3d) 359; [2001] BCJ No 950 (BC SC, Canada).

[989] UNCITRAL, 'UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006' (UN 2008), 35-36.

[990] UNCITRAL, 'UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006' (UN 2008), 35.

[991] Model Law, article 34(2)(a).

composition or arbitration process was not in accordance with the agreement of the parties or any mandatory legal provisions.

Under article 34(2)(b), the Model Law allows the court, on its own initiative, to set aside an award where the dispute is not arbitrable, or where the award is contrary to public policy. The public policy ground extends to both procedural and substantive issues that, according to the Canadian courts, 'offend our most basic notions of morality and justice'.[992] This includes awards made subsequent to an illegal contract, which may engage with errors of law made by the arbitration tribunal.[993] It may also include, as a matter of natural justice, the failure to provide reasons that mitigate the risk of arbitrary decision-making and allow the award to be properly reviewed by the courts.[994]

Although the public policy ground may include substantive issues, under the Model Law there is no appeal to the court specifically on the merits of the award.[995] This precludes applications to set aside an award because of either factual or legal error.[996] This respects the finality of the award, and the autonomy of the parties in choosing arbitration as an alternative to litigation,[997] but it does so at the expense of substantive justice.

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[992] CLOUT case No 391, *Re Corporación Transnacional de Inversiones SA de CV v STET International SpA* (1999) 45 OR (3d) 183; [1999] CanLII 14819 (Ontario SC). Affirmed by: *Re Corporación Transnacional de Inversiones SA de CV v STET International SpA* (2000) 49 OR (3d) 414 (Ontario CA, Canada). See also: *Schreter v Gasmac Inc* (1992) 7 OR (3d) 608, 623 (ON, Canada).

[993] *AJU v AJT* [2011] SGCA 41, [66-69].

[994] *Smart Systems Technology Inc v Domotique Secant Inc* [2008] QCCA 444, [21-28].

[995] *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation*, [2010] SGHC 202,

affirmed in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 3.

[996] *Government of the Republic of the Philippines v Philippine International Air Terminals Co* [2007] 1 SLR 278, [38].

[997] *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305; [2011] SGCA 3, [25].

The grounds for vacating the award connect them to the other provisions of the Model Law that set out the arbitrators' duty to respect party autonomy and the parties' procedural and natural justice rights. For example, a failure to apply the rules of law agreed by the parties under article 28 will satisfy the fourth ground for setting aside the award provided for by article 34(2)(a)(iv). This provision, however, is concerned with procedural, rather than substantive, justice since it applies only to the actual choice of legal rules, and not to whether those rules were applied correctly.[998] Similarly, not providing the parties with an adequate opportunity to respond to evidence and arguments as they arise in the course of proceedings may justify the award being set aside under article 34(2)(a)(iv).[999] Likewise, failing to give the parties adequate notice regarding the non-participation of an arbitrator in making the award means that award could be set aside under article 34(2)(a)(iv) because the tribunal and procedure is inconsistent with the parties' agreement.[1000] Party autonomy is further respected by article 34(2)(a)(iii), which allows the award to be set aside where the arbitrators exceed the scope of their powers under the arbitration agreement.[1001]

The grounds for setting aside an award under article 34(2)(a), which should be 'construed narrowly',[1002] reflect the values of autonomy, procedural justice and natural justice. These focus on protecting the parties' rights and interests. The grounds provided for by article 34(2)(b) focus entirely on the state's interests, which explains why they are matters that may be considered on the court's own initiative. The goal

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[998] CLOUT case No 375, Bayerisches Oberstes Landesgericht, Germany, 4 Z Sch 23/99, 15 December 1999 <http://www.disarb.de/de/47/datenbanken/rspr/bayoblg-az-4-z-sch-23-99-datum-1999-12-15-id16> accessed 30 November 2017; CLOUT case No 569, Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 01/01, 8 June 2001 <http://www.disarb.de/de/47/datenbanken/rspr/hanseat-olg-hamburg-az-11-sch-01-01-datum-2001-06-08-id1274> accessed 30 November 2017.

[999] *Methanex Motunui Ltd. v Spellman* [2004] 3 NZLR 454 (CA, New Zealand).

[1000] CLOUT case No 662, Saarländisches Oberlandesgericht, Germany, 4 Sch 02/02, 29 October 2002 <http://www.disarb.de/en/47/datenbanken/rspr/saarländisches-olg-case-no-4-sch-02-02-date-2002-10-29-id200> accessed 30 November 2017.

[1001] *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202, [26], affirmed by *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 3.

[1002] CLOUT case No 391, *Re Corporación Transnacional de Inversiones SA de CV v STET International SpA* (1999) 45 OR (3d) 183 [1999] CanLII 14819 (Ontario SC).

is to ensure the protection of fundamental values, so preserving the integrity of the arbitration process, while respecting the autonomy of the arbitration process by restricting the court's involvement to the minimum necessary.[1003] As, Allen J explained:

> In the interest of comity ... predictability ... and respect for autonomy ... it is only in exceptional circumstances that an arbitral decision will be set aside ...
>
> While there is great deference shown to arbitral tribunals, the Tribunal has the obligation, pursuant to Articles 18 and 34 of the Model Law, to ensure equal treatment of the parties, that minimum procedural standards are observed and that their decision does not offend public policy.[1004]

The opportunity for deference to arbitration, and to respect party autonomy, is further provided for by the discretionary nature of the court's power. Even where a ground for vacating an award has been satisfied, the court may still refuse to set aside the award where it decides that the procedural flaw had no effect on the substantive outcome.[1005]

Article 34(3) imposes a non-extendable time limit on an application to have the award set aside.[1006] The application must be made within three months of physically receiving the final award,[1007] allowing for any requests for correction under article 33

[1003] *Quintette Coal Limited v Nippon Steel Corporation* [1991] 1 WWR 219, 229; [1991] CanLII 5708 (BC CA, Canada); *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 3; [2011] 4 SLR 305, 317-318 [25-27].

[1003] *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454, [105]; *Louis Dreyfus SAS v Holding Tusculum BV* [2008] QCCS 5903 (Canada).

[1004] *Bayview Irrigation District #11 v United Mexican States* (2008) CanLII 22120, [13-14] (Ontario SC, Canada).

[1005] *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd* [2009] HKCFI 94, [40].

[1006] CLOUT case No 566, *ABC Co v XYZ Ltd* [2003] 3 SLR 546 (Singapore).

[1007] *Moohan v S & R Motors (Donegal) Ltd* [2009] IEHC 391, [3.4-3.11].

to be disposed of by the tribunal. This three-month period provides a reasonable length of time that balances the applicant's interest in justice against the values of efficiency and finality, both of which are important features of arbitration. By allowing an appeal to the courts, which provides a guarantee against procedural errors or an abuse of the arbitrators' power, the integrity of the arbitration process is reinforced. Further reinforcement of arbitration's integrity is provided for by article 33(4), which allows the court to:

> suspend the setting aside proceedings ... to give the arbitral tribunal an opportunity to resume arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

As a final point, article 34 of the Model Law makes no explicit reference to whether the parties may exclude or vary the right to apply to the court to have an award set aside. This might be taken to imply that the rule providing for the right is mandatory. Certainly, the grounds are for vacating the award are presented as exclusive, meaning that the scope of judicial review under the Model Law may not be widened.[1008] How far the parties should be allowed to vary the arrangement engages a balance primarily between autonomy and justice, but also involves the values of finality and efficiency. While some courts have held that article 34 is not a mandatory provision and so may be varied by the parties,[1009] it has been held that any such power does not extend to breaches of natural justice.[1010] Other courts, however, have treated the provision as mandatory.[1011]

[1008] *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454, [105].

[1009] *Noble China Inc v Lei Kat Cheong* (1998) 42 OR (3d) 69.

[1010] *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454.

[1011] *Shin Satellite Public Co Ltd v Jain Studios Ltd* [2006] 2 SCC 628 (India).

Turning to Scots law, the SAR provide three grounds of appeal that allow a party to challenge a final award through an application to the courts.[1012] Under mandatory r.67, a challenge may be raised where the tribunal exceeded its jurisdiction. A challenge may also be raised under mandatory r.68 where there has been a 'serious irregularity' in the arbitration proceedings. A list of qualifying irregularities is set out under r.68(2), which includes: procedural irregularities; breaches of natural justice; an incapable or unqualified arbitrator; an arbitrator or arbitral appointments referee acting *ultra vires*; an uncertain or ambiguous award; and an award that is obtained by fraud or is otherwise contrary to public policy. For an irregularity to be characterised as 'serious', it must cause a 'substantive injustice'.[1013] Legal error provides the third ground, under r.69, for challenging an award,[1014] but requires the applicant to identify a clearly discernible point of law.[1015] Unlike the other two grounds, this is a default rule that may be disapplied by the parties' agreement. For all three grounds, the court's decision may be appealed, but the appellate court's decision may not. This limits court involvement, serving the interests of efficiency and finality.[1016]

While not identical, the grounds provided for by the mandatory r.67 and r.68 are equivalent to those allowed by the Model Law. The most significant difference is the option for a legal error challenge under r.69. This provides the parties with some control over the availability of judicial review, respecting party autonomy more than the Model Law's approach. In so doing, the SAR allow the parties a degree of freedom to determine the balance between justice, accuracy, efficiency and finality. At the same time, the mandatory nature of r.67 and r.68 means that the state's interests in justice and other matters of public policy are secured. This balance of interests is maintained against the background concern of maintaining a pro-arbitration culture

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[1012] Under r 71: 'No appeal may be made against a provisional award'.

[1013] SAR, r 68(2).

[1014] *SGL Carbon Fibres Ltd v RBG Ltd* [2012] CSOH 19; *Manchester Associated Mills Ltd v Mitchells & Butler Retail Ltd* [2013] CSOH 2.

[1015] *In Arbitration Application 1 of 2013* [2014] CSOH 83, [28-30].

[1016] Hew R Dundas, 'The Arbitration (Scotland) Act 2010: converting Vision into Reality', (2010) 76 *Arbitration* 2, 14.

that respects party autonomy and the finality of the award,[1017] with minimal court interference as a means of supporting the arbitration process. This is reflected in the threshold requirements, such as the 'substantive injustice' condition that must be satisfied for legal error and serious irregularity challenges. It is further reflected in the additional conditions imposed on a legal error challenge. Under r.70(2), a legal error appeal cannot be made unilaterally by one of the parties, but requires either the agreement of both (or all) parties or leave from the court. Under r.70(3), leave will be granted only where: 'deciding the point will substantially affect a party's rights'; 'the tribunal was asked to decide the point'; and the tribunal's decision is 'obviously wrong' or for points considered to be of 'general importance', the decision 'is open to serious doubt'.[1018] A decision will only be considered 'obviously wrong' where it involves 'a major intellectual aberration, or "making a false leap in logic or reaching a result for which there was no reasonable explanation"'.[1019]

A further difference between the Scots Law and the Model Law approaches is that the SAR make it explicit that any challenge based on a serious irregularity,[1020] or a legal error,[1021] must involve a substantive injustice. Although substantive injustice is not an explicit requirement under the Model Law, its terms have been interpreted and applied by the courts to produce a similar standard of review. Thus, the Model Law requires that the grounds are 'construed narrowly', protecting the fundamental rights of the parties where the flaws in the arbitration proceedings have significantly affected the substantive outcome of the dispute resolution. The similarity of the standard may be seen in the following comparison. In *Bayview Irrigation District #11 v United Mexican States*, Allen J commented that: 'it is only in exceptional

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[1017] *Arbitration Appeal No 3 of 2011* [2011] CSOH 164; 2012 SLT 150, [7].

[1018] *Arbitration Appeal No 3 of 2011* [2011] CSOH 164, [26].

[1019] *In Arbitration Application 1 of 2013* [2014] CSOH 83, [32]. The quote relied on by Lord Woolman is from *HMV UK Ltd v Propinvest Friar Partnership* [2012] 1 Lloyd's Rep 416.

[1020] SAR, r 68.

[1021] SAR, r 69.

circumstances that an arbitral decision will be set aside'.[1022] The Departmental Advisory Committee on Arbitration Report on the Arbitration Bill 1996, relied on in *Arbitration Application 1 of 2013*, similarly explained that serious irregularity appeals were designed as: 'available only in extreme cases'.[1023]

It should also be noted that the SAR, designed as procedural rules, understandably provide far more detailed guidance regarding the procedures for challenging the awards. The Model Law simply sets down the grounds and the time limits for challenge, leaving it to the individual states to furnish the detailed procedural rules. The SAR, by contrast, establish a comprehensive framework of rules, providing the advantages of both clarity and certainty. This notably includes the requirements that: 'the appellant has exhausted any available arbitral process of appeal or review', but only insofar as they can resolve the issue with the award;[1024] the applicant notifies both the other parties and the tribunal; the court's decision may be appealed provided it grants leave and the appeal is brought within 28 days.[1025]

Under r.68, where the issues relate to public policy, procedural or natural justice, allowing the courts to vary the award would undermine the integrity of the arbitration process by infringing on the tribunal's jurisdiction. Thus, r.68 precludes the court from varying the award, but allows it to 'order the tribunal to reconsider the award (or part of it)'. A similar power is available as a remedy for a legal error under r.69. In both cases, the presumption is to order reconsideration of the award. The option of setting aside should only be utilised where the court 'considers reconsideration inappropriate'. This respects the mandate of the arbitration tribunal and supports the integrity of arbitration by preserving, as far as possible, the final award. Because the

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[1022] *Bayview Irrigation District #11 v United Mexican States* (2008) CanLII 22120, [13-14] (Ontario SC).

[1023] *In Arbitration Application 1 of 2013* [2014] CSOH 83, [18]. Note that the Scottish provision was based on s 68 of the English Act.

[1024] *In Arbitration Application 1 of 2013* [2014] CSOH 83, [16].

[1025] SAR, r 71.

tribunal may be required to reconsider the award, this impacts on finality balancing it against justice and legal accuracy. It also impacts on the efficiency of the process, but this is limited by the three-month time limit for reconsideration imposed by the mandatory r.72.

Turning now to consider the SAL 2012. As under the Model Law and Scottish Act, article 49 allows an award to be challenged before the courts only by the setting aside action provided for by the Act. Unlike the SAR, which allow for internal arbitration appeal/review and indeed require that this option is exhausted before applying to the court,[1026] article 49 of the SAL 2012 only permits appeals to the competent court.[1027] This approach, which precludes internal arbitration appeal/review is an unfortunate limitation on both party autonomy and the autonomy of the arbitration process. It would have been better had the SAL 2012 provided for such mechanisms, particularly given the establishment of the SCCA. Although the SCCA was established after the SAL 2012 had been passed, it was likely anticipated as a future development during the legislative process.

Article 50(1) of the SAL 2012 follows the Model Law in providing an exhaustive list of grounds for vacating an award on the application of one of the parties.[1028] These grounds, while set out and worded differently to the Model Law provisions, allow the award to be vacated for similar flaws in the arbitration proceedings. These are: (a) where an arbitration agreement is invalid; (b) where one of the parties lacked the requisite capacity at the relevant time; (c) where there has been a breach of natural justice denying the party the opportunity to present its case; (d) where the tribunal rendered the award without applying the legal rules agreed by the parties; (e) where the tribunal formation violated the SAL 2012's provisions or the parties' agreement; (f) where the tribunal exceeded its jurisdiction, allowing the award or severable part

[1026] SAR, r 71(2).

[1027] SAL 2012, articles 50, 51.

[1028] *Yuksel v Arabian Pipes*, Case no 4151/1/S (2015 (1436H)).

of the award to be vacated; and (g) where the contents of the award have been affected by a reliance on unauthorised proceedings or by a failure to comply with the prerequisite conditions for the award.

Article 50(2) of the SAL 2012 follows the Model Law by allowing the court on its own initiative to vacate an award that is contrary to public policy or is not arbitrable. Consistent with the Islamic nature of the state, article 50(2) also allows the court to vacate an award that is inconsistent with *Sharia*. Furthermore, it also allows the court, on its own initiative, to vacate an award that contravenes the parties' agreement. Crucially, and consistent with the Model Law, article 50(4) precludes the court from examining the substantive merits of the award. As the Riyadh Administrative Appeals Court emphasised: 'Arbitration law bans the concerned court from inspecting the subject matter of the case'.[1029] In a case for nullification of an award granting the defendant ownership rights to a percentage of the plaintiff's land. The Mecca Court of Appeal rejected the claim and ordered the award to be implemented because it was not inconsistent with *Sharia* law and the plaintiff's case, based on the subject matter of the award, fell outside the article 50 grounds for nullification. Thus, in deciding whether to vacate an award, the court will rely restrictively on the grounds set out in article 50.[1030] As such, and unlike the approach under the SAR, there is no scope for a legal error challenge.

Any setting aside application must be made within sixty days,[1031] which is shorter than the three months under the Model Law. This makes the process more efficient than under the Model Law. Furthermore, the right to make such an application cannot

[1029] *Yuksel v Arabian Pipes*, Case no 4151/1/S (2015 (1436H)). See also: case no 2289/1434. Riyadh Administrative Appeal Court, February 2014 as cited in: Majed Alrasheed, Judge Mostafa Abdel-Ghaffar, 'Saudi Strides' (11 April 2017) *Global Arbitration Review* <www.globalarbitrationreview.com> accessed 20 August 2018.

[1030] Case of nullification of arbitration award, (2015 (1436H)) case no 361279083.

[1031] SAL 2012, article 51(1).

be waived or excluded before the award has been issued.[1032] The Model Law is silent on this issue, which makes this provision a useful clarification that prioritises justice over party autonomy. In this regard, the SAL 2012 is consistent with the approach under the SAR, which provides for inalienable rights to bring jurisdictional or serious irregularity challenges. Only legal error challenges may be disapplied,[1033] but legal error challenges are unavailable under the SAL 2012.

While both the Model Law and the SAR allow the court to remit the issue back to the arbitration tribunal, such an option is not available under the SAL 2012. Under the Model Law,[1034] the court may suspend the setting aside proceedings to allow the tribunal the opportunity to resolve any issues that may eliminate the grounds for setting aside the award. For serious irregularity and legal error challenges,[1035] the SAR allow the court to order the tribunal to reconsider the award. Although the scope of the authority afforded to the tribunal under the SAR is wider than that afforded by the Model Law, both approaches provide greater respect for the autonomy and integrity of arbitration. It is, therefore, unfortunate that a similar authority is not available under the SAL 2012.

While the Model Law is silent on the issue of a legal appeal against a setting aside judgment, the SAL 2012 understandably fills that lacuna. Article 51(2) precludes any appeal against a decision that declines the setting aside application and confirms the award. Where, however, the award is set aside, then an appeal may be lodged within thirty days. This is different to the Scottish approach, which allows an appeal regardless of whether the award is confirmed or set aside. By refusing to allow an appeal against a court's decision to confirm an award, the SAL 2012 prioritises the finality of the award. Furthermore, by freely allowing a time-limited appeal against

[1032] SAL 2012, article 51(1).

[1033] SAR, r 69.

[1034] Article 33(4).

[1035] SAR, r 68(3), r 70(8).

the court's decision to set aside an award, the SAL 2012 further consolidates its supportive role, facilitating resolution of the dispute by arbitration.

5.6.4 Challenging enforcement

In providing for the recognition and enforcement of an arbitration award, the Model Law was drafted to ensure consistency with the NY Convention.[1036] Beyond the option of allowing the state to make enforcement conditional on reciprocity,[1037] and subject to article 36, recognition and enforcement are mandatory as reflected in the use of "shall" in article 35(1),[1038] which provides:

> An arbitral award, irrespective of the country in which it is made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

Before considering the grounds allowing the courts to refuse recognition and enforcement, it should be noted that there are no time limits under article 35. This is for individual jurisdictions to determine, consistent with their obligation under the NY Convention.[1039]

Consistent with article V of the NY Convention, article 36 sets out an exhaustive list of seven grounds that allow a national court to refuse to recognise or enforce an

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[1036] UNCITRAL, 'UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006' (UN 2008), 37.

[1037] See article I of the NY Convention, article 1 of the Model Law, and: UNCITRAL, *Report of the UN Commission on International Trade Law (on the work of its eighteenth session)*, Official Records of the General Assembly, Fortieth Session, Supplement No 17, A/40/17 (UN 1985), para 309.

[1038] CLOUT case No 366, *Europcar Italia SpA v Alba Tours International Inc*, (1997) 23 OTC 376 (Canada).

[1039] CLOUT case No 1009, *Yugraneft Corp v Rexx Management Corp* [2010] SCC 19; [2010] 1 SCR 649, [14-24], relying on article III of the NY Convention.

award.[1040]. They are identical to the grounds allowing for setting aside, with the additional ground that a court may refuse to recognise or enforce an award that has: 'not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made'. By allowing the same grounds for both setting aside and enforcement challenges: 'the model law attempts to avoid the problem of "split validity" which enables an award to be found invalid in the state of origin but valid and enforceable abroad'.[1041] This is an important goal, but is only capable of limited success since variations between states regarding public policy and arbitrability allow the courts of different jurisdictions to differently conclude whether an award should be set aside or recognised and enforced.

Under article 36, the court is afforded discretion where one of the grounds that justify a refusal to recognise or enforce an award is satisfied.[1042] When combined with the mandatory nature of the wording in article 35, and a supportive judicial approach that restrictively interprets the article 36 grounds,[1043] this creates a presumption in favour of recognition and enforcement. Such a presumption defers to the tribunal and is consistent with a respect for arbitration as an alternative to litigation for resolving disputes.[1044] It allows the courts to refuse recognition and enforcement where there is a significant issue of justice or public policy. At the same time, this discretion allows the court to enforce the award where there is evidence of a flaw, but the consequences did not amount to a material injustice.[1045]

[1040] CLOUT case No 740, *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR 174 (Singapore).

[1041] Mary E McNerny, Carlos A Esplugues, 'International Commercial Arbitration: The UNCITRAL Model Law' (1986) 9 *Boston College International & Comparative Law Review* 47, 58.

[1042] CLOUT case No 366, *Europcar Italia SpA v Alba Tours International Inc,* (1997) 23 OTC 376.

[1043] CLOUT case No 391, *Re Corporación Transnacional de Inversiones SA de CV v STET International SpA* (1999) 45 OR (3d) 183 [1999] CanLII 14819 (Ontario SC).

[1044] CLOUT case No 351, *Food Services of America v Pan Pacific Specialties Ltd* (1997) 32 BCLR (3d) 225, [14-15].

[1045] CLOUT case No 76, *China Nanhai Oil Joint Service Corporation, Shenzhen Branch v Gee Tai Holdings Co Ltd* [1994] 3 HKC 375, 388.

Turning to the Scottish Act. Under s.11(1), the 'tribunal's award is final and binding on the parties', but this is conditional on the parties' right to challenge the award as provided for by the SAR or 'by any available arbitral process of appeal or review'.[1046] Where the award is not subject to an appeal or correction, then s.12 allows the court to enforce the award on the application of any party, provided it is satisfied that the tribunal had jurisdiction. As with the Model Law, the wording suggests that the judge has discretion and is not obliged to order enforcement. Unlike the Model Law, there is no exception allowed for issues of natural or procedural justice, arbitrability, or public policy.

For foreign 'Convention awards', as defined by s.18, the courts must recognise and enforce awards considered binding on the parties.[1047] Discretionary exceptions to this are provided for by s.20, which effectively implements article V of the NY Convention. Section 20 also implements article VI of the NY Convention, allowing the court to suspend proceedings where an application has been made to set aside the award. Section 21 implements article IV of the NY Convention, requiring the applicant to provide suitable evidence of the arbitration agreement and award. These provisions fulfil Scotland's obligations under the NY Convention, as discussed previously.

Like Scotland, Saudi Arabia is also bound by its obligations under the NY Convention. Unlike the Scottish Act, and the Model Law, the relevant provisions of the NY Convention are not incorporated into the SAL 2012. Nevertheless, reciprocal recognition and enforcement of foreign arbitration award is anticipated by the Enforcement Law of 2012,[1048] which allows applications to be considered by Enforcement Courts rather than the Board of Grievances. Crucially, under article 11(a) the national courts are forbidden from scrutinising the merits of foreign

[1046] Scottish Act, s 11(3).

[1047] Scottish Act, s 19.

[1048] Royal Decree No M/53 of 13 *Sha'ban* 1433H (2012).

arbitration awards and, under article 6, there is no appeal from a decision of the Enforcement Court. The former of these provisions limits the extent of the court's encroachment on the arbitration process and the latter will ensure that any application for enforcement will not be subject to a protracted process of appeals. Both features should encourage enforcement applications, but may be counteracted by the possibility of the losing party initiating an enforcement dispute.[1049] This is defined under article 1 of the Enforcement Law as a dispute over the validity of the enforcement conditions. These actions, which are subject to an appeal process, allows enforcement to be stayed until the matter is resolved and may result in significant delays.[1050]

Prior to the enactment of the 2012 Arbitration and Enforcement Laws, Saudi had a poor record of enforcement. This is reflected in Zeger's conclusion that:

> a party attempting to enforce a foreign arbitral award in Saudi Arabia will face considerable challenges … to the best of our knowledge, there is no precedent of a foreign arbitral award ever being successfully enforced in Saudi Arabia.[1051]

How far the 2012 laws will counter the historical approach is dependent on the establishment of a more pro-arbitration attitude. It is worth noting, however, that a successful action for the enforcement of a foreign award was reported in May 2016.[1052] This case may be indicative of a change in culture, reflecting a greater

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[1049] Hosam ibn Ghaith, 'Saudi Enforcement Court confirms that it would enforce a London ICC Award' (Online, 13 July 2016) *Kluwer Arbitration Blog* <http://kluwerarbitrationblog.com/2016/07/13/saudi-enforcement-court-confirms-that-it-would-enforce-a-london-icc-award/> accessed 30 November 2017.

[1050] Enforcement Law 2012, article 10.

[1051] Jean-Benoit Zegers, 'National Report for Saudi Arabia', in: Jan Paulsson (ed) (Kluwer Law International 1984, Supplement No 75 2013) *International Handbook on Commercial Arbitration* 1, 50.

[1052] Henry Quinlan, Amer Abdulaziz Al-Amr, 'Landmark enforcement decision in the Kingdom of Saudi Arabia' (Online, 31 May 2016) *Lexology* <http://www.lexology.com/library/detail.aspx?g=b76552e8-5755-4965-b5bd-f39df216af7b> accessed 30 November 2017.

willingness to enforce foreign awards. However, as a single case, it is not definitive of such a change, which needs confirmation through future enforcement judgments. It should, however, be noted that the judgment is consistent with the trend in recent court judgments that suggest Saudi courts are taking a less interventionist approach consistent with the norms of modern ICA.[1053]

The current enforcement regime engages both the SAL 2012 and the Enforcement Law. Under article 53 of the SAL 2012, the competent court must enforce a valid and enforceable award. However, an application may not be made until the time-limit for making a setting-aside application has expired.[1054] Under article 55, the courts may order enforcement, of the whole award or severable part, only where: the award does not conflict with any existing court, committee or tribunal decision or order; the award is consistent with *Sharia* law and Saudi public policy; the other party was properly notified of the award. There is no appeal against an enforcement order, but an order refusing enforcement may be appealed within thirty days.[1055]

The key provision under the Enforcement Law, is article 11, which applies to foreign judgments and imposes five conditions governing an enforcement order. These are: (a) the courts are not authorised to examine the merits of the award; (b) the natural justice rights of the other party were respected, affording that party the opportunity to present a defence; (c) the award is final and binding; (d) the award does not conflict with any judgment or order regarding the same matter and issued by a competent national judicial authority; and (e) the award is consistent with Saudi public law and policy, including *Sharia*.

[1053] Majed Alrasheed, Judge Mostafa Abdel-Ghaffar, 'Saudi Strides' (11 April 2017) *Global Arbitration Review* <www.globalarbitrationreview.com> accessed 20 August 2018.

[1054] SAL 2012, article 55.

[1055] SAL, article 55(3).

Perhaps the key issue with the approach under Saudi law is the exception to enforcement where an award conflicts with *Sharia*.[1056] The public policy exception generally is provided for by the NY Convention and is included as part of the Model Law. While *Sharia* is noted explicitly, alongside the public policy exception, in article 55 of the SAL 2012, this simply clarifies and emphasises the importance of *Sharia*, which is integral to the state and its public policy.[1057] This is evident in the Saudi Constitution, which is perfused by references to Islam and the *Sharia*, characterising the country as Islamic,[1058] governed in accordance with the *Sharia*.[1059] Most tellingly, the King is required to implement national policy, which must be 'legitimate policy in accordance with … Islam'.[1060] Requiring compliance with *Sharia* is, therefore, simply one aspect of requiring compliance with Saudi public policy. As Harb and Leventhal note: 'it is difficult to draw a clear delineation between public policy and *Shari'a* because religion and government are inextricably linked in the Kingdom of Saudi Arabia'.[1061] As such, allowing an exception to enforcement based on a conflict between the award and *Sharia*, is consistent with Saudi's obligation under the NY Convention. As a final point, however, it should be noted that where possible, the courts are likely to distinguish those parts of the award that are inconsistent with *Sharia* and hence unenforceable, from those parts that are consistent with *Sharia* and hence enforceable.[1062]

[1056] Ahmed A Altawyan, 'The Legal System of the Saudi Judiciary and the Possible Effects on Reinforcement and Enforcement of Commercial Arbitration (2017) 10 *Canadian International Journal for Social Science and Education* 269, 270. See also, Mohammed I Aleisa, 'A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?' (PhD thesis, University of Essex 2016), 181-199.

[1057] Nicholas Bremer, 'Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries' (2016-2017) 3 *McGill Journal of Dispute Resolution* 37, 56.

[1058] Basic Law of Governance 1992, article 1.

[1059] Basic Law of Governance 1992, article 8.

[1060] Basic Law of Governance 1992, articles 55.

[1061] Jean-Pierre Harb, Alexander G Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 *Journal of International Arbitration* 113, 115.

[1062] *Janoup Al Jazira v Assim Arab Centre for Environmental Consultations* (2017 (1438H))) Case no 38249619, Riyadh Court of Appeal; Mohamed Khairi Al-Wakeel, *Comments on the New Saudi Arbitration Law* (King Fahd National Library, 2014/1435H), 117.

5.7 Conclusion

This chapter focused on an examination of the arbitration award and the opportunities for challenging the award. The analysis was restricted to court-based applications, which included litigation to have the award set aside and enforcement actions that provide national courts with the opportunity to refuse to recognise and enforce an arbitration award. Other than briefly noting their availability, internal appeals mechanisms provided as part of the arbitration process itself were not addressed. For completeness, interim orders and provisional awards were briefly considered.

The starting point was that, regardless of any other advantages that it provides, the goal of arbitration is to resolve the dispute. This resolution is achieved through the final award, which should be designed to settle the substantive issues of the dispute by adjusting the parties' rights and obligations in a way that is acceptable to both the parties and the state supporting the arbitration process. As discussed here and in chapter two, the acceptability of the final award is dependent essentially on the fairness of the arbitration process. Where an award has resulted from a process perceived as unfair, which is more likely where a disgruntled party believes the award to be substantively unjust, that party may seek to challenge the award through the courts, either by an action to set aside the award or by resisting enforcement. This raises the questions of finality and enforceability.

An arbitration award will not resolve the dispute unless it is both final and enforceable. While it would be possible for the law to support arbitration by treating all awards as final and enforceable, regardless of whether they were fair or acceptable, the state has an obligation to ensure that disputes are subject to at least minimal requirements of justice. This obligation is fulfilled through the legal framework that sets out the duties and powers of both the arbitration tribunal and the courts. Consequently, the arbitrators must exercise their power consistently with the legal duties imposed on them. These legal duties support the obligations arising from the contractual relationship between the arbitrators and the parties. Furthermore, the trust

invested in the relationship between the parties and the arbitrators creates a moral source of duty that reinforces and supplements the legal duties.

In determining the moral duties, the analysis utilised Rawls' veil of ignorance to suggest that, in relation to the arbitration award, arbitrators have five basic duties: a duty to do what is reasonable to ensure enforceability; a duty to act within their jurisdictional authority; a duty to act fairly and impartially in rendering the award; a duty to render an accurate award through reasoned argument based on the evidence and the parties' cases; a duty to give reasons for the award. How far these moral duties are enforced depends on the framework of national legal rules. This framework establishes *ex ante* procedural rules that constrain the arbitrators' power and *ex post* powers allowing the parties to challenge or enforce an award. As with the general rules of procedure, discussed in chapter three, this framework seeks to balance the values and interests of party autonomy, justice and cost-effectiveness, which makes arbitration an attractive and viable alternative to litigation. In achieving this balance, the current trend in ICA is for the national legal system to play a supportive role, facilitating a cost-effective arbitration process by restricting the power of the courts to set aside, or to refuse recognition and enforcement, of an award.

The pro-arbitration bias is reflected in the limited scope of judicial review, with the courts generally empowered to set aside an award where there are significant breaches of procedural justice or jurisdiction. In most jurisdictions, the courts are precluded from reviewing the substantive merits of the award. Some jurisdictions, however, allow an award to be set aside for legal, but not factual, error. Under English law, for example, legal error review is available, but is subject to the agreement of the parties, who may choose to exclude the option. This permits the parties to decide whether the award should be open to a legal error challenge, allowing them to vary the scope of judicial review, within limits established by the national law. This provides the parties with the power to fine tune the balance between accuracy, as an element of justice, and finality. This is more respectful of party autonomy than an approach that simply precludes the option of a legal error challenge, which prioritise finality and efficiency over justice and party autonomy.

While the setting aside action is a matter entirely for national law, the recognition and enforcement of foreign awards is subject to the NY Convention. As parties to the NY Convention, both Scotland and Saudi Arabia must reciprocally recognise and enforce foreign awards unless one of the article V grounds for refusing enforcement is satisfied. These include jurisdictional errors, procedural flaws and matters of public policy, but not substantive errors of fact or law. Of the permitted exceptions, it is public policy that provides the greatest scope for different approaches to enforcement. For Saudi Arabia, this exception crucially allows the national courts to refuse enforcement of awards that are inconsistent with *Sharia*.

The point of discussing these issues is that they identify the interests, values and constraints that inform the framework established by the national legal systems. In comparing the legal frameworks of the Model Law, the Scottish Act, and the SAL 2012, there are three relevant factors. First, the framework will be affected by differences in the degree of pro-arbitration bias. Second, the frameworks may vary because the balance between the relevant interests and values is set differently. Third, the framework, or its implementation, may vary because of different public policy concerns.

As a general point, the approach under the Scottish Act, because of the SAR, provides the most detailed framework, while the Model Law is the least detailed. The SAL is generally more detailed, but closer to the Model Law than the Scottish framework. This distinction is not specific to the aspects of arbitration discussed in this chapter and, because of its general nature, it will be considered further in the concluding chapter. Here, it is sufficient to note that the SAR allow a more nuanced flexibility than is possible under either the Model Law or the SAL 2012. This allows the parties greater scope for fine tuning the balance between party autonomy, justice and cost-effectiveness to better suit their needs.

The most notable feature of the *ex ante* requirements for a legally valid award under the SAL 2012 is that article 42(1) imposes a mandatory duty on the arbitrators to give reasons. Under both the Model Law and the SAR, this duty may be waived by the parties. Allowing a waiver respects party autonomy by enhancing the flexibility of the process. The approach under the SAL 2012, however, prioritises justice and enhances the legitimacy of arbitration as a rational mechanism for resolving disputes. Not requiring the reasons to be stated would perhaps be slightly more efficient, but the value of transparency to justice and the integrity of the process outweigh the minimal gains to autonomy and efficiency. It would however, be worth providing further detail regarding the extent of the reasoning required, particularly since the courts in other jurisdictions have not always agreed on what constitutes adequate reasons.

The flexibility afforded by the SAR is most clearly evidenced in the default r.69, which allows a legal error challenge, but makes that power subject to the parties' contrary agreement. Neither the Model Law nor the SAL 2012 allow a legal error challenge, which reflects a priority for finality and efficiency over accuracy, as an element of substantive justice, and party autonomy. All three frameworks, however, provide similar mandatory rules reflecting a baseline concern with ensuring a minimum standard of justice, allowing an award to be vacated for a breach of procedural or natural justice sufficient to undermine confidence in the substantive justice of the final award. All three frameworks also impose a similar constraint on the arbitrators' jurisdictional power, allowing an award to be set aside where the tribunal has exceeded its jurisdiction. This approach, which is consistent with the main hypothesis, prioritises the integrity of arbitration, and the values of justice and autonomy, over finality and efficiency. Under the SAL 2012, however, that priority is itself constrained by limiting the challenge against the award to a first instance decision. That decision is only open to appeal where the court sets aside the award and not where the court declines to set aside the award. By contrast, the SAR, allow an appeal against the first instance decision regardless of whether the court confirms or sets aside the award. Under the Saudi approach, and consistent with the fourth

subsidiary hypothesis, a greater respect is given to the arbitration tribunal's decision, the integrity of the process and the finality of the award.

This pro-arbitration approach, visible in the asymmetrical power to appeal against a setting aside order, is inconsistent under the SAL 2012. While both the Model Law and the SAR allow for an internal arbitration appeal process, that must be exhausted before an application is made to the courts, under the SAL 2012 the only recourse against an award is by an application to the court. Furthermore, under both the Model Law and the SAR, the issue may be remitted back to the arbitration tribunal. The approach under Scottish Law affords the tribunal greater power to reconsider its award than does the Model Law, but both frameworks are more pro-arbitration in this regard than the SAL 2012, which, inconsistently with the first and second subsidiary hypotheses, requires the court to decide the case without re-engaging the tribunal.

In improving the framework for challenging an arbitration award established under the SAL 2012, it would be better to allow the additional flexibility provided for by the SAR. Particularly, the parties should be able to choose whether a legal error appeal should be available, which would improve consistency with the second subsidiary hypothesis. While the recent history of arbitration in Saudi Arabia may make the legislature cautious regarding legal error appeals, the additional respect it affords autonomy in allowing the parties to decide whether the arbitrators' duty of accuracy should be enforceable justifies putting aside that caution. In addition, the SAL 2012 should allow for internal arbitration appeal mechanisms. Furthermore, allowing the court to remit the award back to the arbitration tribunal would enhance the pro-arbitration approach. Finally, it should be made explicit, under article 50 of the SAL 2012, that the grounds for setting aside must meet a threshold of causing a substantive injustice. This follows the approach under the SAR and is consistent with the way in which the grounds have been narrowly construed when implementing the Model Law in practice. It would also be consistent with the approach taken by the Mecca Court of Appeal, which rejected a claim for nullification because the complained of

procedural flaws had not substantively affected the award.[1063] By requiring substantive injustice, the court's interference is restricted, respecting the autonomy and efficiency of arbitration, and respecting the finality of the award while still protecting against the more egregious procedural failings.

Beyond the opportunity to challenge an award through a setting aside application, all three legal frameworks provide for the recognition and enforcement of arbitration awards. Since both Scotland and Saudi Arabia are parties to the NY Convention, their national courts have an obligation to recognise and enforce foreign awards unless one of the exceptions under article V applies. The approach under the Scottish Act is to implement the NY Convention directly through the Act. This is clearer than the approach under Saudi law, which engages both the SAL 2012 and the Enforcement Law of 2012. Although consistent with the obligations of the NY Convention, it would have been better had the terms of article V been explicitly implemented as part of the SAL 2012. This would not preclude the additional explicit reference to inconsistency with *Sharia* as a ground for non-enforcement since the *Sharia* is integral to Saudi's public policy.

In conclusion, the SAL 2012 broadly follows the Model Law and generally reflects a pro-arbitration approach. Consistent with the main hypothesis, it provides for a fair balance between the interests of justice, party autonomy, and cost-effectiveness, although it gives slightly less weight to autonomy than do either the Model Law or the SAR. It provides a reasonably detailed framework that can be justified by reference to the arbitrator's duties, which include: the duty to render an award consistent with the arbitrators' jurisdictional authority; the duty to act fairly and impartially in rendering the award; and the duty to give reasons. Beyond requiring the tribunal to apply the rules of law agreed by the parties, the SAL 2012 does not, however, include any requirement for accuracy. In this regard, the law could be improved by allowing the parties the option of agreeing to a legal error appeal. The

[1063] Implementation of arbitrators' award, (2015 (1437H)) case no 3798925.

facility, under the SAR, to allow the tribunal to issue draft awards, would also improve the law by further enhancing the accuracy of the award. The law could further be improved by allowing for an internal arbitration appeals mechanism and by allowing the courts to remit the award back to the tribunal for rectification where this may prevent the need for the award to be set aside. Finally, the rules of enforcement could be clarified by directly implementing article V of the NY Convention as part of the SAL 2012.

Over the course of this chapter and the previous three chapters, the legal framework provided for by the SAL 2012 has been subjected to a comparative and normative legal analysis. The SAL 2012 was compared to both the Model Law and the Scottish Act, with its associated SAR. That legal analysis was given a normative foundation by considering how well the legal frameworks balanced the three core principles of ICA. Over the course of chapters two to five, the analysis engaged with the regulation of jurisdiction, the arbitration agreement, the arbitration tribunal and proceedings, and the arbitration award. In chapter six, the concluding chapter, the analyses of those four aspects of the arbitration process will be drawn together and proposals will be made for how the SAL 2012 could be reformed to achieve a balance between the core principles that better reflects the values and needs of modern ICA.

Chapter Six: Conclusion

Nine years before the enactment of the SAL 2012, Brower and Sharpe observed that:

> when one views the current strength and vibrancy of international dispute resolution in the Islamic world against arbitration's troubled history there during the past half-century, one cannot fail to see progress at every level.[1064]

At that time, arbitration in Saudi was governed by the SAL 1983, which had established a comprehensive legal framework for arbitration. While certainly a sign of progress, the SAL 1983 nonetheless fell short of resolving all the criticisms levied at the regulation of arbitration in Saudi Arabia.[1065] The SAL 1983 was replaced by the SAL 2012, which was enacted to further modernise arbitration in Saudi and make it more attractive to the international commercial community. It is the SAL 2012 that forms the focus of this research and the question is how far this legislation continues the earlier progress to meet the demands of ICA.

To focus the research on the needs of ICA, and to avoid the limitations of a purely doctrinal analysis, the research question asked how far the SAL 2012 is consistent with the core principles of modern ICA. These three core principles, identified in chapter one as: party autonomy; justice; and cost-effectiveness,[1066] were then used as normative tools to facilitate the critical comparative analysis of the legal framework

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[1064] Charles N Brower, Jeremy K Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97 *The American Journal of International Law* 643, 656.

[1065] See sections 1.5.3-1.5.4

[1066] See section 1.5.2.

provided for by the SAL 2012. That analysis, which compared the SAL 2012 with the Model Law and the Scottish Act, was directed at four key elements of arbitration: jurisdiction; the arbitration agreement; the arbitration tribunal and proceedings; and the arbitration award. These were considered in dedicated chapters that first examined the foundational theoretical issues before applying that initial analysis to the comparative examination of the SAL 2012.

In this concluding chapter, the analyses carried out in chapters two to five, will be combined to highlight the areas where the SAL 2012 may be improved and generate proposals for the future development of the legal regulation of arbitration in Saudi Arabia. That process begins in the first section with a brief overview of the main issues. In the second section, that process will be continued by considering how well the SAL 2012 has implemented the three core principles. The process will be completed in the third section, which considers proposals for how the SAL 2012 could be reformed to further enhance the balance between party autonomy, procedural justice and cost-effectiveness This section will engage not just with the proposals in isolation but will also consider the possible issues that may arise when relying on legal transplantation as a mechanism for reform. The chapter, and thesis, ends with a final concluding statement.

6.1 The Main Issues

The first notable issue is that, although its approach to the court's gateway jurisdiction is broadly similar to that under both the Model Law and Scottish Act, the SAL 2012 unfortunately lacks a provision equivalent to article 5 of the Model Law. Second, the

SAL 2012 does not permit the parties to apply to court to determine a point of law or to challenge an award for legal error. Third, the SAL 2012 fails to fully define a valid arbitration agreement and requires the agreement to be completed in writing. Furthermore, the SAL 2012 imposes additional restrictions, such as requiring an odd number of arbitrators,[1067] who must be of good character.[1068] Fourth, while the SAL 2012 provides for a reasonably accessible framework of mandatory and default rules, this is not as comprehensive, nor as clear, as the Scottish approach, which provides for a complete set of arbitration rules.[1069] Fifth, while explicitly requiring arbitration to be *Sharia* compliant, the SAL 2012 lacks detail on the constraints imposed by *Sharia*. Sixth, where the selection of arbitrators fails, the SAL 2012 requires the parties to apply to court for assistance. This is less progressive than the approach under the Scottish Act, which allows for arbitration appointment referees. Seventh, there is no justice-based constraint on the court's power to remove an arbitrator. Eighth, the SAL 2012 fails to explicitly deal with the requirement for confidentiality. Ninth, the SAL 2012 only allows an award to be challenged through the courts by a setting aside action, which restricts the parties' freedom to utilise any available internal arbitration appeal mechanisms. Furthermore, in reviewing an award, the courts are not constrained by any requirement that the setting aside action should only succeed where it prevents a substantial injustice. Finally, the courts lack the power to refer the award back to the tribunal.

[1067] SAL 2012, article 13.

[1068] SAL 2012, article 14.

[1069] Scottish Act, sch 1.

These issues arise from the attempt to balance the interests of party autonomy, justice and cost-effectiveness. How well the SAL 2012 achieves an appropriate overall balance between these three core principles will be addressed in the next section. However, one further issue with the SAL 2012 warrants mentioning here, particularly with regard to the need to encourage a pro-arbitration culture. This issue is the lack of any general statement of governing principles, such as that provided for by s.1 of the Scottish Act. The failure to include such a provision is a shortcoming that may be easily remedied by the proposal set out below.

6.2 The Implementation of the Core Principles of Modern ICA by the SAL 2012

Through the enactment of the SAL 2012, supported by the Enforcement Law of 2012, Saudi Arabia has, consistently with the main hypothesis, significantly liberalised the legal framework regulating ICA. Whatever its weaknesses, the SAL 2012 significantly reforms the previous regime under the SAL 1983. This does not, however, mean that there is no room for improvement, and the next section of this chapter is dedicated to proposals for how the law might be further developed. It should, however, be acknowledged that the SAL 2012 provides a legal framework consistent with the needs of modern ICA and should foster a pro-arbitration culture.

In this thesis, the SAL 2012 was assessed through comparison with the Model Law and the Scottish Act, using the three core principles of party autonomy, justice and cost-effectiveness as normative yardsticks. Because it is the source of the tribunal's jurisdiction, and because it is the basis for allowing parties to choose the arbitrators

and ‘control the details of their disputing process',[1070] party autonomy was considered arbitration’s foundational principle. Through party autonomy, arbitration provides an attractive alternative to litigation. Arbitration, however, is a hybrid system enabled by the state and reliant on its support. This allows the state to maintain an interest in ensuring that arbitration is just, and that interest is reinforced by the parties’ need for the process to be just. Thus, while party autonomy is foundational, it must be tempered by justice. Beyond the importance of party autonomy and justice, for arbitration to provide a viable alternative to litigation, it must be capable of producing an effective award. Finally, it is in the interests of parties that the process is efficient, proceeding with minimal delays and costs. Thus, a suitable legal framework must achieve a rational balance between party autonomy, justice and cost-effectiveness.

The overall impression, and affirming the main hypothesis driving the analysis, is that the SAL 2012 does establish an appropriate balance between these principles. When compared to the SAL 1983, it ensures greater respect for party autonomy, consistently facilitates the process, minimises delays and most significantly restricts the opportunity for court intervention. Under the SAL 2012: arbitration agreements no longer need court approval; awards no longer need confirmation by the courts, since the responsibility for ensuring *Sharia* and legal compliance rests solely with the tribunal;[1071] and the scope of the court’s power has been restricted to prevent any review of an award’s merits. These restrictions are more consistent with the demands

[1070] Edward Brunet, 'The Core Values of Arbitration' in Edward Brunet, Richard E Speidel, Jean R Sternlight, Stephen J Ware (eds) *Arbitration Law in America: A Critical Assessment* (Cambridge University Press 2006) 3.

[1071] SAL 2012, article 38.

of modern ICA and provide much greater respect for party autonomy than the approach under the SAL 1983.

The improvements introduced through the SAL 2012 flow from its reliance on the Model Law. Although the SAL 2012 does not implement the Model Law, its influence permeates the SAL 2012. Generally, the balance between the three core principles is similar, but under the SAL 2012 is shifted towards efficiency and justice. This emphasis is even more marked when compared to the Scottish Act and associated SAR. Despite this, the SAL 2012 still ensures a respect for party autonomy that significantly improves on the SAL 1983. Furthermore, the respect for party autonomy is consistent with the modern culture of ICA. As evidenced by the limited role for the courts, party autonomy more definitively provides the foundational principle for the current Saudi legal framework than under the previous regime. The flexibility required by party autonomy is, nevertheless, more limited than under either the Model Law or the Scottish Act and the SAR.

It may be helpful to illustrate these conclusions with a few specific examples, such as the requirement under the SAL 2012 that arbitration agreements must be concluded in writing, rendering oral agreements invalid, even where they have subsequently been recorded in writing. Another example is the restrictions placed on arbitrator selection, which require the parties to appoint an odd number of arbitrators, who must be of good character, with one arbitrator possessing a degree in *Sharia* or legal sciences. A further example is the lack of facility for the parties to agree that a legal error appeal should be allowed. While there may be good reasons for the restrictions,

such as the controversial nature of legal error appeals and the criticisms levied at the previous law, they all limit party autonomy. It is submitted that the law could be further developed and reformed to increase the flexibility of the process, so enhancing respect for party autonomy, without unduly sacrificing the interests of justice and cost-effectiveness.

Other aspects of the law that may be improved include both the role that the law plays in creating and maintaining a pro-arbitration culture, and the formal justice concerns of clarity and comprehensiveness. In the following section, several proposals will be suggested for further developing the legal framework to build on the significant improvements introduced by the SAL 2012, providing for the needs of international commerce while preserving the interests of the state.

6.3 Proposals for Future Development

The main constraint on making proposals for further development is the lack of information on how the SAL 2012 works in practice. Ideally, such information should be gathered through empirical studies looking at arbitration cases and using interviews and focus groups to gain a better understanding of how well the current legal framework meets the needs of the international arbitration community. In preparation for any such future empirical studies, the research presented in this thesis was an entirely text-based analysis, focusing on the doctrinal and normative aspects of the law. Despite the limitations of this focus, exacerbated by the lack of legal cases, it is nevertheless possible to suggest how the law might be improved. The following

proposals for amending the SAL 2012 are submitted. Before explaining those proposals, the issue of legal transplantation will first be considered.

6.3.1 Legal transplantation and the reform of the SAL 2012

Developing national law by 'borrowing from a different jurisdiction has [long] been the principal way in which law has developed'.[1072] It is, after all, sensible to use law that demonstrably works, and it may well offer the best solution provided there are good reasons for reforming the law and the transplanted law is not inconsistent with the socio-legal culture of the borrowing jurisdiction.[1073] In Saudi Arabia, for example, the main socio-legal constraint on legal reform is the need for consistency with the *Sharia*,[1074] and the risk that foreign legal transplants will be resisted by the institutions and jurists of the *Sharia* legal system. However, too much may be made of different cultural and political contexts. As Watson observes: 'Very different social, political and economic circumstances may nonetheless be conducive to the creation of the same legal rule', whether borrowed or developed independently.[1075] The same, or very similar, legal rules can function in very different circumstances.[1076] Indeed, as Ayad explains: 'Contract law and ICA are well suited to harmonisation with the

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[1072] Alan Watson, *Society and Legal Change* (2nd edn, Temple University Press 2001). 98.

[1073] Alan Watson, *Society and Legal Change* (2nd edn, Temple University Press 2001). 98-99.

[1074] Mary B Ayad, 'Harmonisation of International Commercial Arbitration Law and *Sharia*' (2009) 6 *Macquarie Journal of Business Law* 93, 94.

[1075] Alan Watson, *Society and Legal Change* (2nd edn, Temple University Press 2001). 106.

[1076] Alan Watson, *Society and Legal Change* (2nd edn, Temple University Press 2001). 110.

Sharia'.[1077] *Pacta sunt servanda*,[1078] *rebus sic stantibus* and *force majeure*, for example, are principles applicable to both Western and Islamic legal systems.[1079]

Since rules must be interpreted, and interpretation is culturally dependent, the transplanted legal rules may not operate identically in the donor and recipient jurisdictions.[1080] Variations on the theme, however, are unimportant provided the theme itself is enhanced. The goal here is not to import legal rules that operate identically to the rules in their original cultural setting. Rather, and bearing in mind the Model Law harmonisation goals of ensuring supportive legal regulation and enabling party autonomy,[1081] the aim is to enhance the interaction and balance between the three core principles, so facilitating a modern approach to arbitration under the Saudi Arabian legal framework. The three principles of party autonomy, justice and cost-effectiveness, which are the driving force behind the proposals, are not alien to Islamic countries. Indeed, as previously explained, Islam values free will and self-determination, albeit constrained by the obligation to follow the *Sharia*. Furthermore, justice, in both its substantive and procedural senses, is central to Islam.

[1077] Mary B Ayad, 'Harmonisation of International Commercial Arbitration Law and *Sharia*' (2009) 6 *Macquarie Journal of Business Law* 93, 94.

[1078] See the Holy Qu'ran, chapter 5, verse 1, which states 'O you who believe, fulfil the obligations' (the Arabic term is *uqud*, which encompasses covenants, contracts, agreements etc).

[1079] Saba Habachy, 'Property, Right and Contract in Muslim Law' (1962) 62 *Columbia Law Review* 450, 459-460; Emilia Justyna Powell, Sara McLaughlin Mitchell, 'The International Court of Justice and the World's Three Legal Systems' (2007) 69 *The Journal of Politics* 397, 401; Mary B Ayad, 'Harmonisation of International Commercial Arbitration Law and *Sharia*' (2009) 6 *Macquarie Journal of Business Law* 93, 101.

[1080] Pierre Legrand, 'The Impossibility of 'Legal Transplants' (1997) 4 *Maastricht Journal of European & Comparative Law* 111, 115.

[1081] TT Arvind, 'The "Transplant Effect" in Harmonization' (2010) 59 *International and Comparative Law Quarterly* 65, 70.

And cost-effectiveness is a rational principle for any commercial environment, which applies as much to Islamic and Arabic countries as to any Western state. It is arguably even more important since Islam characterises Muslims as Allah's vicegerents, as embodied in the concept of *khilafa.*[1082] As the custodians of Earth's wealth, it behoves all Muslims to avoid wastefulness, which in turn requires effectiveness and efficiency. Provided the imported rules function to enhance the balance between the three principles, then the transplantation may be considered a success.

Provided the proposals are consistent with *Sharia*, then given the dual nature of Saudi Arabia's legal system (see 1.3.5), changes to the secular system should not be a 'legal irritant' that 'creates wild perturbations in the interplay of discourses' within the *Sharia* legal system or even to Saudi law as a whole.[1083] It is, as Siems notes, easy to exaggerate the risk that 'foreign influences' will act as 'irritants'.[1084] Furthermore, as Arvind observes: '[N]o legal system is entirely a prisoner of its own past traditions'.[1085] Rather, the ongoing reform of the law, coupled with the development of the SCCA, should act as a positive influence on the arbitration culture in Saudi Arabia, reducing the risk that the proposals made in this thesis will act as 'irritants' or be met with undue resistance. As noted above, the proposed legal rules may not be

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[1082] The Holy Qu'ran, chapter 2, verse 30; chapter 6, verse 165; Sayd Farook, 'On Corporate Social Responsibility of Islamic Financial Institutions' (2007) 15 *Islamic Economic Studies* 31, 33; Muatasim Ismaeel, Katharina Blaim, 'Toward applied Islamic business ethics: responsible halal business' (2012) 31 *Journal of Management Development* 1090, 1091.

[1083] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11, 12.

[1084] Mathias Siems, *Comparative Law* (Cambridge University Press 2014), 197.

[1085] TT Arvind, 'The "Transplant Effect" in Harmonization' (2010) 59 *International and Comparative Law Quarterly* 65, 81

interpreted in quite the same way as in the donor jurisdiction, and this may impact on how the rules operate in practice. However, given the global nature of ICA and the three core principles, and given the changes to the arbitration institutions and framework already implemented in Saudi Arabia it would misrepresent the proposals to characterise them as 'alien' rules that are incapable of 'domestication' and 'will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change'.[1086] In any case, the goal behind the proposals made here is to facilitate further evolution of the Saudi legal framework for arbitration. Provided that the change resulting from the proposals is beneficial and desired, then it seems inappropriate to consider the transplanted legal rules as 'irritants'.

In ensuring the success of the transplanted rules, and hence securing the intended benefits for Saudi Arabia, it is important to appreciate that this is likely to depend at least as much, if not more, on 'the process of legal reform and development … than the substance of transplanted rules'.[1087] It is, therefore, crucial that Saudi Arabia intends to improve the commercial competitiveness of the country (see 1.3.5). This includes the goal of modernising arbitration as evidenced in the new legal framework, the SCCA, and the commercial courts. To further support an appropriate culture of arbitration, as Majeed al Rasheed, the CEO of the SCCA, explained: 'the Ministry of Justice is developing judicial training programmes and the [SCCA] … is developing

[1086] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11, 12.

[1087] Mathias Siems, *Comparative Law* (Cambridge University Press 2014), 198.

research and professional development activities that will open a dialogue with judges'.[1088] Indeed, it is recognised that arbitration institutions can help a country develop its approach to arbitration by 'actively participat[ing] in developing arbitration laws and best practices … publishing decisions, hosting conferences and training events, and participating in public fora'.[1089] Further to the crucial role of the SCCA, the 'growing interest in arbitration in Saudi Arabia' coupled with the trend for Saudi lawyers to further their education in ICA at Western universities, should also facilitate the diffusion of ICA norms.[1090]

Together, these innovations should allow the culture of arbitration to develop alongside the changes in the legal framework and institutions. The reforms proposed in the subsequent sections of this chapter are aimed at fitting in to and complementing this already ongoing process of change. In so doing, the proposals should improve rather than 'distort' the existing legal framework.[1091] Indeed, there are already cases that suggest the courts are taking a more supportive and less interventionist approach. In one case, for example, the court relied on the separability of the arbitration clause to hold that it should not be subject to other choice of law clauses within the main

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[1088] Alison Ross, 'Introducing the Saudi Center for Commercial Arbitration' (3 November 2016) *Global Arbitration Review* <www.globalarbitrationreview.com> accessed 20 August 2018.

[1089] Mohamed Abdel Raouf, 'Emergence of New Arbitral Centres in Asia and Africa: Competition, Cooperation and Contribution to the Rule of Law' in Stavros Brekoulakis, Julian DM Lew and Loukas Mistelis (eds) *The Evolution and Future of International Arbitration* (Kluwer Law International 2016) 321, 325.

[1090] Alison Ross, 'Introducing the Saudi Center for Commercial Arbitration' (3 November 2016) *Global Arbitration Review* <www.globalarbitrationreview.com> accessed 20 August 2018.

[1091] Katharina Pistor, 'The Standardization of Law and its Effect on Developing Economies' (2002) 50 The *American Journal of Comparative Law* 97, 98.

contract.[1092] Furthermore, in several cases, the courts have accepted that they have 'no jurisdiction to re-examine the substance of the case decided by the arbitral tribunal'.[1093]

6.3.2 General proposals

Based on the analysis carried out in this thesis, and following the Scottish approach, it is submitted that the SAL 2012 should be amended to include an additional article that sets out the founding principles underlying the legal framework. The aim behind this article would be to set the tone for the legal regulation of arbitration, which should foster a pro-arbitration culture, while also acknowledging the Islamic context. Because of this aim, the founding principles should be set down in article one, which emphasises their importance. As discussed previously, there are no cultural barriers that would prevent the three core principles from being understood and applied to enhance the legal regulation of arbitration in Saudi Arabia. The establishment of the commercial and enforcement courts and the SCCA should have a positive cultural impact on arbitration.[1094] By emphasising the underlying principles, this proposed article should help to encourage a light touch approach and reduce the risk that the courts may be tempted to retain the interventionist approach that was one of the main

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[1092] Case no 32328746, Riyadh General Court, February 2012 as cited in: Majed Alrasheed, Judge Mostafa Abdel-Ghaffar, 'Saudi Strides' (11 April 2017) *Global Arbitration Review* <www.globalarbitrationreview.com> accessed 20 August 2018.

[1093] Majed Alrasheed, Judge Mostafa Abdel-Ghaffar, 'Saudi Strides' (11 April 2017) *Global Arbitration Review* <www.globalarbitrationreview.com> accessed 20 August 2018. They specifically cite case no 2289/1434. Riyadh Administrative Appeal Court, February 2014.

[1094] Mohamed Abdel Raouf, 'Emergence of New Arbitral Centres in Asia and Africa: Competition, Cooperation and Contribution to the Rule of Law' in Stavros Brekoulakis, Julian DM Lew and Loukas Mistelis (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International 2016) 321, 324-325.

issues with arbitration under the previous legal regime of the SAL 1983.[1095] Under this article, and provided the implementation of these proposals is coupled with the provision of professional education for relevant lawyers and judges,[1096] the courts should develop an expertise that appropriately respects party autonomy and serves to facilitate and support a just system of *Sharia*-compliant arbitration. Based on s.1 of the Scottish Act, the following is proposed:

Article 1. The founding principles of these regulations are:

(1) The object of arbitration is to provide the parties with a *Sharia* complaint alternative mechanism to litigation for resolving disputes.

(2) The three foundational principles of arbitration, which provide the basis for the regulations and should be used to aid interpretation are:

    a. The principle of party autonomy

    b. The principle of justice

    c. The principle of cost-effectiveness

(3) Based on its contractual origins, the principle of party autonomy means that the parties should be free to agree on the rules governing the arbitration of the dispute between them. This freedom is subject only to the mandatory rules of these regulations, which are necessary to ensure a procedurally just process, to ensure consistency with the *Sharia* and to safeguard the public interest.

[1095] TT Arvind, 'The "Transplant Effect" in Harmonization' (2010) 59 *International and Comparative Law Quarterly* 65, 78.

[1096] TT Arvind, 'The "Transplant Effect" in Harmonization' (2010) 59 *International and Comparative Law Quarterly* 65, 81.

(4) Based on the principle of justice, the process of arbitration should be fair to all parties, should allow all parties the equal opportunity to present their case and should be resolved by impartial arbitrators.

(5) Based on the principle of cost-effectiveness, arbitration must proceed without unnecessary delay or expense. The competent court should not intervene except as permitted under these regulations.

The second general proposal, again following the Scottish approach, is for a comprehensive set of rules governing the arbitration process. These rules should include a limited number of mandatory rules, restricted to those strictly necessary to ensure: a fair, just and effective procedure; consistency with *Sharia*; and consistency with the public interest. To respect the principle of party autonomy, all other rules, including those aimed at ensuring efficiency, should be default. Rather than attempt to provide a full set of rules as part of this proposal, it would be better for them to be developed following an empirical analysis of arbitration in Saudi Arabia and could be based on the procedural rules already applied by the SCCA,[1097] which are themselves based on the UNCITRAL Arbitration Rules adapted to fit in with local cultural expectations. This could be used as the basis for a consultation process (*shura*) that would allow the development of a comprehensive set of rules that balance the needs of all stakeholders and clearly distinguish the mandatory from the default rules. This set of rules could be accommodated through a basic law of arbitration,

[1097] SCCA, *Arbitration Rules, Mediation Rules* (SCCA 2016).

containing the mandatory rules and providing for the application of default rules, which would be contained in a supplementary law.

6.3.3 Jurisdiction proposals

The SAL 2012 already provides for both the principle of competence-competence and the doctrine of separability, which are usefully contained in two distinct articles. However, to further emphasise the autonomy of the arbitration process, and the court's limited role, it would be helpful to follow the Model Law and include the two provisions under a dedicated chapter, entitled "Jurisdiction of the arbitration tribunal". Furthermore, to serve both party autonomy and efficiency, article 20(3) should be labelled as a default, rather than mandatory, rule.

Presently, article 20(3) provides that where the tribunal rejects a lack of jurisdiction plea, this may only be challenged through the courts by an annulment claim. While this reinforces the principle of competence-competence, it does so at the expense of party autonomy and may be less efficient than allowing an application to the court concurrent with ongoing arbitration proceedings. Simply changing the rule from mandatory to default will not affect the justice of the process, but will enhance party autonomy and may improve efficiency. It is proposed that article 20(3) should be amended as follows:

> 20(3) - Subject to the parties' agreement to the contrary, the arbitral tribunal may either rule on the pleas referred to in paragraph 1 of

> this Article prior to ruling on the merits or rule on all of them at the same time.
>
> Where the tribunal dismisses the jurisdictional plea prior to ruling on the merits then, subject to the parties' agreement to the contrary, the decision may be appealed to the competent court. The arbitration proceedings may continue while waiting for the appeal to be decided.
>
> Where the jurisdictional challenge is determined concurrently with the merits, and the tribunal dismisses the plea, then the decision cannot be challenged except through an application to set aside the final award in accordance with Article 54 of this Act.

To support the emphasis on the autonomy of arbitration and the tribunal's jurisdiction, it would also be helpful to follow article 5 of the Model Law and formally provide that the court may only intervene as permitted under the regulations, which would explicitly include both the proposed basic and supplementary laws of arbitration. Such a rule would be consistent with the current trend, which has seen the courts accept a less interventionist and more facilitatory approach than was the experience under previous legal regimes.[1098] It would also be symbolically important and may help to further encourage a pro-arbitration culture. The rule should be mandatory and, although included as part of the proposed article 1 on the general principles, it should be provided for in more detail by including an additional article under chapter 1

[1098] See 6.3.1.

(general provisions). This mandatory rule should also permit the court of enforcement's role in enforcing arbitration awards, as provided for by the Enforcement Law of 2012. For clarity's sake, the proposed new article is referred to here as article 8(A):

> For any matter governed by this Act, or by the Supplementary Law of Arbitration, no court is permitted to intervene except where so provided in this Act, the Supplementary Law of Arbitration or in the Enforcement Law of 2012.

Finally, and following the approach under SAR r.41 and r.42, the proposed supplementary law of arbitration should include a default rule allowing the court to determine a referred point of law. The proposed article is:

> Subject to the contrary agreement of the parties, the competent court may, on the application of any party to the arbitration agreement, determine any point of Saudi law or *Sharia* law arising in the arbitration.
>
> For the application to be valid, all parties must have consented to the application, or the tribunal must have given its consent and the court is satisfied that allowing the application will be in the interests of justice and cost-effectiveness.
>
> Arbitration proceedings may be continued while awaiting the decision of the competent court.

> The decision of the competent court is final and binding on the tribunal.

By allowing the parties to determine the importance of legal accuracy to the fairness of the award, the rule would enhance party autonomy and justice, and may make an award more acceptable to the losing party. This proposal would be supported by the option of a legal error challenge (see section 6.3.5).

Although this proposal may be considered controversial since it permits the court a more interventionist role than allowed under the Model Law, it is consistent with the approach taken both in Scotland and England, both of which are respected jurisdictions with London being one of the leading centres for ICA.[1099] Given the importance to *Sharia* of making decisions based on truth,[1100] allowing parties the option of applying to the court to determine a question of law, the rule is consistent with the legal culture in Saudi Arabia. Indeed, as the Holy Qu'ran states: 'mix not up truth with falsehood'.[1101] Thus, a rule allowing the parties to apply to the courts to ensure legal accuracy should at least be acceptable and may be a desirable choice for many parties. Finally, by making it a default rule, the choice is left to the parties

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[1099] School of International Arbitration Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018), 9 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration.PDF> accessed 21 August 2018.

[1100] Sa'eed ibn Mut'ib Al-Qahtaanee, 'A Study of the Legal Maxim "No Validity is Attached to Conjecture which is Obviously Tainted by Error (Laa Ibrata Bidh-Dhann-il Bayyani Khata'uhu)" and its Juristic Applications' (2014) Issue 62 *Al-Adl* 41, 84. See also:4.4.2.

[1101] Holy Qu'ran, chapter 2, verse 42.

themselves. As such, the rule is not a mandate for the court to intervene, but an option that respects party autonomy.

6.3.4 Arbitration agreement proposals

It should first be noted that the proposal that, following the Scottish approach, Saudi Arabia should provide a complete set of arbitration rules will ensure a complete and effective arbitration agreement. To support this, it would be helpful for the law to explicitly define a valid arbitration agreement. To respect the parties' autonomy, the rule should specify that the agreement is only valid when made by competent natural or juridical persons and that it must made be made voluntarily by parties who have a reasonable understanding of their rights and obligations under the agreement. In the interests of justice this should be a mandatory rule but given the recognition of the need for competence (*ahliyyah*),[1102] the requirement for adequate information,[1103] and the importance of free will in Islam, such a rule would be consistent with the legal culture in Saudi Arabia. Indeed, the whole faith of Islam is grounded in the ability of humans to exercise their free will and choose whether to believe in Allah.[1104] This proposed article 9, would replace the current article 9(2) and article 10(1), with the

[1102] Holy Qu'ran, chapter 2, verse 282; Md. Abdul Jalil, Muhammad Khalilur Rahman, 'Islamic Law of Contract is Getting Momentum' (2010) 1 *International Journal of Business and Social Science* 175, 187.

[1103] Parviz Bagheri, Kamal Halili Hassan, Mehdi Shabannia Mansour, 'Parties' legal capacity in electronic commerce transactions' (2017) 44 *European Journal of Law and Economics* 503, 505.

[1104] Holy Qu'ran, chapter 18, verses 29, 54-56; Abdur Rashid Bhat, 'Free Will and Determinism: An Overview of Muslim Scholars' Perspectives' (2006) 2 *Journal of Islamic Philosophy* 7.

current article 9(1) and (3) and the current article 10(2) becoming a new article 10. The proposed article 9 is:

> An arbitration agreement will be valid and effective only of it has been concluded with the consent of the parties to the agreement. The parties giving consent, whether competent natural or juridical persons or their representatives: must have the legal capacity to dispose of their rights; must have a reasonable understanding that the agreement commits them to arbitrate the relevant dispute; and must have given their consent voluntarily.
>
> The arbitration agreement may be concluded orally or in writing. Where the agreement is concluded orally, the agreement will only be valid if it subsequently recorded in writing before the commencement of any arbitration proceedings.

Because of the importance of the NY Convention, it would be unwise to completely remove the requirement for arbitration agreements to be in writing. A formal record of the agreement is also useful for evidentiary purposes. Furthermore, the Holy Qu'ran explicitly prescribes that a contract must be recorded in writing: 'O you who believe, when you contract a debt for a fixed time, write it down'. Note that the context of this verse suggests that the requirement for writing is to provide evidence of the contract and so 'to keep away from doubts'. Indeed, it goes on to state that a contract for a contemporaneous exchange of goods, under which both parties' obligations are wholly fulfilled, is valid and acceptable even if not recorded in

writing.[1105] This is consistent with the aim of the proposal here. Thus, given the demands of modern commercial activity, and as a respect for party autonomy, the formal requirement should be modified to allow for the agreement to be valid even if concluded orally, provided that the agreement is subsequently recorded in writing prior to the commencement of arbitration proceedings. This is consistent with the Qu'ran*ic* requirement for writing and provides a reasonable balance between commercial practicalities, party autonomy and the formal justice requirement for evidential certainty. Requiring the agreement to be recorded should also reduce the risk of subsequent disagreements over its content and, furthermore, provides important evidence regarding the tribunal's jurisdiction.

Given the foundational importance of party autonomy, it is proposed that the issue of privity should be provided for in the SAL 2012, rather than the IRSAL 2017. It is also submitted that article 13 of the IRSAL 2017 should be amended to explicitly provide for a third party to be bound by the arbitration agreement through legal succession as well as consent. This would be consistent with both a previous Saudi judgment[1106] and the approach taken by the European Court of Justice in a case involving a choice of forum clause in a bill of lading.[1107] Furthermore, the article should be amended to remove the discretion afforded the tribunal to refuse to agree to allow the third party

[1105] Holy Qu'ran, chapter 2, verse 282.

[1106] Case no 269/3/J, (1988 (1409H)), Board of Grievances as cited in: Majed Alrasheed, Judge Mostafa Abdel-Ghaffar, 'Saudi Strides' (11 April 2017) *Global Arbitration Review* <www.globalarbitrationreview.com> accessed 20 August 2018.

[1107] Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV and Others* [2000] ECR I-9362, 9375, para 27.

to join the arbitration. This should be fully determined by the consent of all parties. Where the tribunal agrees to allow a third party to intervene, the tribunal should be required to take into consideration the parties' wishes and whether the decision would substantially prejudice one of the parties. It should be required to give reasons for any decision, and there should be the right to challenge the decision before the competent court. Such an approach would adequately balance the principles of autonomy and justice.[1108]

Furthermore, and specifically for the benefit of non-Muslim parties, the law should be amended to clarify the *Sharia* prohibitions of *riba* (interest) and *gharar* (speculation) and their implications for the arbitration agreement. It should be made explicit that an agreement to arbitrate a dispute involving *riba* or *gharar* (eg speculative contracts, or disputes over speculative damages) would not be a valid arbitration agreement. However, to respect party autonomy as far as possible, the validity of the agreement should be preserved where it is possible to remove the offending part without undermining the agreement. The proposed article 10(A) is:

> Any arbitration agreement, or part thereof, that is prohibited by *Sharia* will be deemed null and void. This includes: agreements concerning speculative contracts or speculative damages; agreements that allow for award to include the payment of interest; and agreements to arbitrate disputes regarding services or

[1108] SI Strong, 'Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?' (1998) 31 *Vanderbilt Journal of Transnational Law* 915, 978-987.

commodities prohibited by *Sharia*, such as interest-based financial services, gambling, adult entertainment, alcohol, and pork.

An arbitration agreement will still be considered valid if the affected part can be separated from the remainder of the agreement without destroying the purpose or function of the agreement.

6.3.5 The arbitration tribunal and proceedings proposals

As suggested above, legislating for a comprehensive set of arbitration rules, with a clear distinction between mandatory and default rules, would provide a flexible framework that both respects party autonomy and ensures a just process. While it has been argued that the rules should be drafted following an empirical study and a period of consultation with the relevant stakeholders, some specific proposals will be explained here.

First, the parties should have greater control over the composition of the arbitration tribunal. It would be more respectful of party autonomy to make article 13 a default provision, allowing the parties to agree on the number of arbitrators without requiring an odd number. While an odd number avoids problems with majority decision making, the option of appointing an arbitration 'umpire' under article 39(2) provides an equally effective mechanism for resolving a split decision. Article 13 should also be amended to provide for a default number of arbitrators. The proposed amended article 13 is:

> The arbitral tribunal shall be composed of one or more arbitrators. The parties are free to decide on the number of arbitrators that will constitute the tribunal. Where the parties fail to decide, then by default the tribunal shall be composed of one arbitrator.

Providing for a default of one arbitrator serves the interests of cost-effectiveness by ensuring that the arbitration may proceed with the minimum cost expended on the tribunal. Out of respect for party autonomy, where the parties are happy to meet the expense of a larger panel then they are free to agree on a tribunal comprised of two or more arbitrators.

Further to the number of arbitrators, the requirement, under article 14, for the appointed arbitrators to be of good conduct, is vague and leaves an appointment open to challenge. While it is appreciated that the good conduct requirement is based on the *Sharia* prescription that judges should be worthy of the authority granted them,[1109] it would be better for this to be replaced by an objectively verifiable requirement. Thus, article 14 should be amended to read:

> The arbitrator is required:
>
> 1. To have full capacity;
> 2. To certify that he or she has never been convicted of a serious criminal offence or struck off a professional register;

[1109] Holy Qu'ran, chapter 4, verse 58.

3. To hold at the least, a degree in legal or *Sharia* Sciences; if the arbitral tribunal is composed of more than one arbitrator then it is sufficient if the chairperson fulfils the abovementioned requirement.

It should be noted that the SCCA has produced a Code of Ethics and it may be feasible to also require arbitrators to abide by that Code,[1110] which would further ensure that the arbitrator is worthy of the parties' trust to resolve the dispute fairly.

Second, although there is nothing in the SAL 2012 precluding the appointment of female arbitrators, it would be better if the law explicitly states that arbitrators may be male or female. This may be achieved by further amending article 14, specifically, by changing the first sentence to provide: 'The arbitrator, who may be male or female, is required …'. Despite the recent case in which an administrative court of appeal accepted the appointment of a female arbitrator,[1111] women have traditionally been excluded as arbitrators in Saudi Arabia. Making it explicit that women may be appointed as arbitrators would be consistent with developments in Saudi Arabia.[1112] It would also be consistent with the cultural expectations of the international arbitration community and it would eliminate any doubt regarding the validity of their appointment.

[1110] SCCA, *Code of Ethics: Arbitrators; Mediators; Parties* (2016).

[1111] Mulhim Hamad Almulhim, 'The First Female Arbitrator in Saudi Arabia' (Online, 29 August 2016) *Kluwer Arbitration Blog* <http://kluwerarbitrationblog.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/> accessed 30 November 2017.

[1112] Section 3.3.3

Third, Saudi Arabia should follow the Scottish approach and create the role of arbitration appointment referees that may be appointed to resolve problems arising where the arbitrator selection process breaks down. To facilitate this, the SCCA could administer the process and maintain a register of arbitration appointment referees, who should be sufficiently qualified and experienced in the arbitration process to enable them to fulfil the role. The SCCA could also amend their Arbitration Rules and Code of Ethics to govern the conduct of the referees.

The use of arbitration appointment referees would further limit the court's role, which should minimise delays, making the process more efficient. Furthermore, avoiding the courts' involvement in the appointment of arbitrators respects the autonomy of the arbitration process and should help to foster the development of a pro-arbitration culture. To respect party autonomy, the use of a referee should be a default option, allowing the parties to refer the matter to the referee, but also preserving the option of referring the matter to the court where the parties cannot agree on the use of an appointment referee. While this is based on SAR r.7, the proposal varies that approach by requiring the parties' agreement, rather than relying on a lack of objection. This is because an agreement provides stronger evidence of the party's wishes than does the process of notification and lack of objection. This may be achieved by amending the current article 15(1) to read as follows:

1. The parties to arbitration shall agree on the procedure for the appointment of the arbitrators. Where the parties fail to reach an agreement, the parties may agree to refer the matter to the arbitration appointment referee and request that

> the arbitration appointment referee either: a) determines the appointment procedure; or b) appoints the arbitrators.
>
> Where the parties do not agree to refer the matter to an arbitration appointment referee, or where the arbitration appointment referee fails to determine the appointment procedure or make an appointment within 15 days of the referral, the following default appointment procedure will apply: …

Here the default procedure, and the option to request the court's intervention, would be available as already provided for by the current article 15.

Fourth, article 18 of the SAL 2012 should be amended. Article 18 provides that, where the parties are unable to agree on the dismissal of an arbitrator who has caused an 'undue delay' in the proceedings, the court is empowered, on application, to dismiss the arbitrator. A similar power is available under the SAR, but the court's power is limited, with dismissal only permitted where the delay has resulted in a substantive injustice. This restriction provides a greater respect for party autonomy, while still allowing the court to act where justice is threatened, which would be consistent with the Sharia's requirement for justice: 'Surely Allah commands … that when you judge between people you judge with justice'.[1113] Thus, article 18(1) should be amended to similarly restrict the court's power. The proposed amended article 18(1) is:

[1113] Holy Qu'ran, chapter 4, verse 58.

The competent court may remove an arbitrator and terminate his or her mandate on the request of either party where the following conditions are met:

a. The arbitrator is unable to fulfil the required duties, or fails to fulfil those duties, or causes an undue delay to the arbitration proceedings by interrupting performance of those duties; and
b. The arbitrator does not voluntarily withdraw from office, and the parties do not agree on removing the arbitrator from office; and
c. The delay has caused, or is likely to cause, a substantial injustice to the party requesting the court's intervention.

Finally, the issue of confidentiality should be dealt with explicitly through a default rule as follows.

Unless otherwise agreed by the parties, all matters relating to the dispute, the arbitration proceedings and the award, that are not already in the public domain, are to be treated as confidential. Disclosure of such confidential information may give rise to a legal action for breach of confidentiality unless:

The parties have consented to the disclosure;

Disclosure is necessary to allow the tribunal to fulfil its duties; or

Disclosure is required by law, the public interest or the interests of justice.

The tribunal must ensure that all parties and any expert witnesses involved in the arbitration are aware of the obligation to maintain confidentiality.

This would ensure confidentiality, which reflects both local and international expectations,[1114] unless the rule was specifically dis-applied by the parties. Explicitly providing for confidentiality would be consistent with the Holy Qu'ran which recognises the value of 'secret counsels' when attempting to secure 'reconciliation between people'.[1115] Allowing the waiver respects party autonomy, while the default rule avoids the problem of the parties' failure to explicitly consider the issue as part of their arbitration agreement. It also provides certainty and clarity regarding the confidentiality of the arbitration proceedings.

6.3.6 Arbitration award proposals

First, as with the issue of arbitrability, the SAL 2012 should be more explicit regarding the constraints imposed by *Sharia*. Thus, there should be a mandatory rule prohibiting the tribunal from a making an award that includes the payment of interest

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[1114] The Holy Qu'ran, chapter 49, verse 12; chapter 24, verse 19; Lawrence Rosen, *The Justice of Islam: Comparative Perspectives on Islamic Law and Society* (Oxford University Press 2000), 187-199; Roszaini Haniffa, Mohammad Hudaib, 'Locating audit expectations gap within a cultural context: The case of Saudi Arabia' (2007) 16 *Journal of International Accounting, Auditing and Taxation* 179, 186; Vidushi Marda, Bhairav Acharya, *Identifying Aspects of Privacy in Islamic Law* (2014) < https://cis-india.org/internet-governance/blog/identifying-aspects-of-privacy-in-islamic-law> accessed 22 August 2018; L Ali Khan, 'Arbitral Autonomy' (2013) 74 *Louisiana Law Review* 1, 49-50.

[1115] The Holy Qu'ran, chapter 4, verse 114.

(contrary to the prohibition of *riba*) or speculative damages (contrary to the prohibition of *gharar*). The proposed article 42(A) is:

> Without prejudice to the tribunal's duty to ensure a just award, and considering the obligation on the tribunal to make an award that is not contrary to *Sharia*, the tribunal shall not issue an award that includes the payment of interest or the payment of damages for any possible future losses arising out of the dispute.

Second, when making an award, the SAL 2012 requires, under article 42(1), the reasons for the award to be stated. This mandatory rule provides no further details regarding the scope of the obligation.[1116] Providing reasons serves two main purposes: first, it allows the parties to understand the award, making it easier for the losing party to decide whether to accept the justice of the award or to appeal against it; and second, where an application is brought to vacate the award, it makes it easier for the appellate forum to decide whether the award should be upheld or vacated. To fulfil these purposes, the rule should at least state the minimum scope and extent of the requirement to state the reasons behind the award.[1117] Thus, article 42(1) should be amended to require the reasons to include: a summary statement of the dispute between the parties; the issues raised by the dispute; 'the factual findings and legal or

[1116] Sections 5.6.2, 5.7.

[1117] SI Strong, 'Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy' (2015) 37 *Michigan Journal of International Law* 1, 33.

other reasons' for the award.[1118] To respect party autonomy, there should be a default rule allowing the parties to agree on whether the statement of reasons should include detail of any dissenting opinions.[1119]

Third, the SAL 2012 appears to preclude the option of appealing an arbitration decision through an internal arbitration appeal process. Thus, article 49 only permits the award to be challenged before the competent court. In the interests of both substantive justice and party autonomy, that provision should be amended to allow the parties the power to utilise any suitable internal appeal mechanism. To respect both the autonomy of the arbitration process as well as party autonomy, the right to utilise an arbitration appeal or review mechanism is a default provision that may be disapplied by the parties in their arbitration agreement. The amended article 49 should read as follows:

> Arbitral awards rendered in accordance with the provisions of this Act cannot be challenged by any means of recourse, except for:
>
> 1. Subject to the contrary agreement of the parties, any available arbitration process of appeal or review; and
> 2. The action for setting aside the arbitral award as per the provisions of this Act.

[1118] *Gordon Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57, [218-220]. See also: *Bremer Handelsgesellschaft mbH v Westzucker GmbH* (No 2) [1981] 2 Lloyd's Reports 130, 132-133; *Bay Hotel and Resort Ltd v Cavalier Construction Ltd* [2001] UKPC 34, [25].

[1119] See, SI Strong, 'Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy' (2015) 37 *Michigan Journal of International Law* 1, 23-24.

Furthermore, to enhance the arbitration culture, an appellate arbitration tribunal should be made available under the auspices of the SCCA.[1120] By utilising the SCCA for this purpose, the internal appeal mechanism could be both efficient and sensitive to the need to ensure that the award is *Sharia* compliant.

Fourth, unlike the Model Law and the SAR, the current law does not allow the courts to remit an issue back to the tribunal. To respect the process of arbitration, and the parties' autonomous decision to resolve their dispute through arbitration, the law should be amended to allow the courts, when considering a legal challenge to the award, to remit the matter back to the arbitration tribunal. This would, for example, allow the court to refer the award for reconsideration where the award, or part of the award, contravenes *Sharia*. Such an approach would mitigate the impact of article 50(2) while preserving the cultural and legal expectation that the final enforceable award will be *Sharia* compliant. As explained in chapter five, the Scottish approach provides the greatest respect for the integrity and autonomy of the arbitration process by allowing the court, where appropriate, to remit the award back to the tribunal for reconsideration. The SAL 2012 should be amended accordingly. However, while the SAR leave remittance to the court's discretion, it is submitted that the court's power should be subject to the parties' agreement, which would provide a greater respect for party autonomy without prejudicing justice. This could be achieved by the following proposed article 50(A):

[1120] Council of Saudi Chambers, 'Council Announces Board of Saudi Arbitration Centre' (Online, 15 July 2014) Council of Saudi Chambers <http://www.csc.org.sa/English/News/Pages/14ye12.aspx> accessed 30 November 2017.

> In deciding on the action for setting aside the award, the competent court may:
>
> 1. Confirm the award; or
> 2. Refer the award, or part of the award, back to the tribunal for reconsideration, provided that the court considers that reconsideration is appropriate in the interests of justice. This power is subject to the contrary agreement of the parties; or
> 3. Set aside the arbitration award.

Fifth, consistently with the Model Law and most jurisdictions, the SAL 2012 does not allow the award to be challenged for legal error.[1121] The main reason for the reluctance to allow such an appeal is that it emphasises the autonomy of arbitration as a dispute resolution mechanism. Precluding a legal error appeal limits judicial intervention, emphasises the distinctive nature of arbitration and respects the finality of the award. It prioritises the nature of arbitration as an autonomous system over the justice-based goal of ensuring a legally accurate award and a respect for party autonomy. It should be noted, however, that arbitration is founded on the jurisdictional authority that flows from the contractual agreement between the parties to submit their dispute to arbitration. Out of respect for the parties' autonomy, they should be allowed the discretion to agree on the availability of a legal error appeal. Under the SAR, a default rule allows the parties to raise a legal error challenge. Given

[1121] Section 5.6.3.

the history of arbitration in Saudi, and the past criticism that the law allowed the court too much scope to intervene, it would be better to adopt an opt-in rather than an opt-out approach.[1122] Thus, while challenges for errors of law should be excluded by default, the law should allow legal error as a ground for vacating the award where that option has been explicitly agreed by the parties. Allowing the parties to select a rule that facilitates legal accuracy would serve both party autonomy and justice while also being consistent with the *Sharia* (see 6.3.3). It allows the parties to determine whether the benefit of legal accuracy justifies the costs of making a legal error appeal. The threat to the integrity of the arbitration process and the finality of the arbitration award is minimised by making the rule a default opt-in choice and by coupling the rule with the proposed option of allowing the court to refer the matter back to the tribunal.

The option of a legal error appeal may be achieved by inserting two new paragraphs into article 50.[1123] First, article 50(1)(h) should be added to establish the option for the parties to expand the grounds for a setting aside action to include legal error. The proposed paragraph states: 'Subject to the conditions set out in paragraph (5), where the parties have agreed to an appeal on a question of law'. The following article 50(5) is proposed:

> A party may appeal to the competent court to determine whether the tribunal erred on a point of law. Any such application must

[1122] See, eg, Hong Kong Arbitration Ordinance (Cap 609) 2011, Schedule 2, s 5.

[1123] Based on: SAR, rr 69 and 70; English Act, s 69; Hong Kong Arbitration Ordinance (Cap 609) 2011, Schedule 2, ss 5 and 6.

> identify the relevant point of law and the alleged error of law. In deciding the case, the court must rely on the tribunal's findings of fact in the award to determine whether the tribunal erred on a point of law. Where the reasons for the award are insufficient, the court may require the tribunal to set out its reasons for the award in sufficient detail to allow the court to determine the appeal. The court's decision may only be appealed with the court's permission.

Sixth, article 50 of the SAL 2012 should be reformed to make it explicit that the grounds for setting aside an arbitration award meet a threshold of a substantive injustice, which would be entirely consistent with the *Sharia's* concern with justice.[1124] Such a condition should not apply to article 50(a) and (b), which are concerned with the very validity of the arbitration agreement, and hence the tribunal's jurisdictional authority to resolve the dispute and render the award. Because the option for a legal error appeal has been proposed on the basis that the availability of the appeal is entirely a matter of party autonomy, the requirement for a substantive injustice would also not apply to the proposed article 50(1)(h). Thus, article 50(1) should be amended by adding the relevant provision at the end of the list of cases where an award may be set aside. This should state:

> The action for setting aside the arbitral award under cases (c), (d), (e), (f), and (g) is only admissible where the irregularity in the proceedings has caused, or will cause, a substantive injustice.

[1124] Holy Qu'ran, chapter 4, verse 58.

This follows the SAR and is consistent with Model Law jurisprudence. Such a condition would limit the court's power to intervene, which would respect both the autonomy of arbitration and the finality of the arbitration award, while providing a safety net that protects against substantively significant procedural failings.

Finally, article V of the NY Convention should be directly implemented through the SAL 2012. Although currently provided for by the Enforcement Law of 2012, it would improve the accessibility of the law, and reinforce Saudi Arabia's commitment to ICA, if the provisions of article V of the NY Convention were included as part of the arbitration law.

6.4 Final Concluding Statement

Redfern recently claimed that: 'If parties are looking for a binding and enforceable decision on an international dispute, to be given by a neutral and independent tribunal, then international arbitration is "the only game in town"'.[1125] It is crucial, then, that in this commercially globalised world, progressive nations provide a legal framework that enables and facilitates an arbitration service that meets the needs of international commerce. The SAL 2012 goes a long way towards fulfilling that requirement, and it is certainly a huge improvement over the previous legal framework centred around the SAL 1983. While the SAL 2012 provides for a legal framework that is not out of

[1125] Alan Redfern, 'The Changing World of International Arbitration' in David D Caron, Stephan W Schill, Abby Cohen Smutny, Epaminontas E Triantafilou (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 45, 47.

place in the world of ICA and largely consistent with the main hypothesis, there is still much room for improvement as this research has demonstrated.

Bibliography

Books and Conference Proceedings

Allan TRS, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2001).

Al-Rasheed M, *A Most Masculine State: Gender Politics and Religion in Saudi Arabia* (Cambridge University Press 2013).

Altawyan AA, 'Arbitral Awards Under the New Saudi Laws and International Rules, Challenges and Possible Modernization' in Chhina RK (ed), *4th Academic International Conference on Interdisciplinary Legal Studies: 2016 (Boston) Conference Proceedings* (FLE Learning Ltd 2016) 25.

Alvesson M, Skoldberg K, *Reflexive Methodology: New Vistas for Qualitative Research* (2nd edn, Sage 2010).

Al-Wakeel MK, *Comments on the New Saudi Arbitration Law* (King Fahd National Library, 2014/1435H).

Andrews N, *Arbitration and Contract Law: Common Law Perspectives* (Springer 2016).

as-Sallabi AM, *Umar Ibn Al Khattab: His Life and Times* (volumes 1 and 2) (International Islamic Publishing house 2008).

St Augustin, 'How Like Kingdoms Without Justice are to Robberies' in Schaff P (ed), Shaw JF (trans), Marcus Dods M (trans), *City of God and Christian Doctrine, A Select Library of the Nicene and Post-Nicene Fathers of the Christian Church,* Volume II (The Christian Literature Company 1887).

Baamir AY, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Ashgate 2010).

Baier M, 'Introduction' in Baier M, *Social and Legal Norms: Towards a Socio-legal Understanding of Normativity* (Ashgate Publishing Limited 2013) 1.

Balas V, 'Review of Awards' in Muchlinski P, Ortino F, Schreuer C (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1126.

Banakar R, ‘Can Legal Sociology Account for the Normativity of Law?’ in Baier M, *Social and Legal Norms: Towards a Socio-legal Understanding of Normativity* (Ashgate Publishing Limited 2013) 15.

Bennet SC, *Arbitration: Essential Concepts* (ALM Publishing 2002).

Berger PL, Luckmann T, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Penguin 1966).

Bhaskar R, *Reclaiming reality: A Critical Introduction to Contemporary Philosophy* (Verso 1989).

Bhaskar R, *The Possibility of Naturalism* (4th edn, Routledge 2015).

Bingham T, 'The Rule of Law' (Penguin 2011).

Blackaby N, Partasides C, Redfern A, Hunter M, *Redfern and Hunter on International Arbitration* (Student Version) (5th edn, Oxford University Press 2009).

Blackaby N, Partasides C, Redfern A, Hunter M, *Redfern and Hunter on International Arbitration Practice* (6th edn, Oxford University Press 2015)

Brunet E, 'The Core Values of Arbitration' in Brunet E, Speidel RE, Sternlight JR, Ware SJ (eds), *Arbitration Law in America: A Critical Assessment* (Cambridge University Press 2006) 3.

Buhring-Uhle C, 'A Survey on Arbitration and Settlement in International Business Disputes' in Drahozal CR, Naimark RW, (eds) *Towards a Science of International Arbitration* (Kluwer Law International 2005) 25.

Carbonneau TE, *Carbonneau on International Arbitration: Collected Essays* (JurisNet 2011).

Carbonneau TE, *Toward a New Federal Law on Arbitration* (Oxford University Press 2014).

Caron DD, Schill SW, Smutny AC, Triantafilou EE, ‘Practising Virtue: An Introduction’ in Caron DD, Schill SW, Smutny AC, Triantafilou EE, (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 1.

Cheng B, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 2006).

Cook T, Garcia AI, *International Intellectual Property Arbitration* (Kluwer 2010).

Crystal D, *English as a global language* (2nd edn, Cambridge University Press 2003).

Davidson F, Dundas HR, Bartos D, *Arbitration (Scotland) Act 2010* (W. Green 2010).

Degan VD, *Sources of International Law* (Kluwer 1997).

Di Brozolo LR, 'International arbitration and domestic law' in Cordero-Moss G (ed), *International Commercial Arbitration: Different Forms and their Features* (Cambridge University Press 2013) 40.

Dicey AV, *An Introduction to the Study of the Law of the Constitution* (8th ed (1915), Liberty Classics 1982).

Dobinson I, Johns F, 'Qualitative Legal Research' in McConville M, Chui WH, (eds) *Research Methods for Law* (Edinburgh University Press, 2010) 16.

Donovan DF, 'The Transnational Advocate' in Van Den Berg AJ (ed), Arbitration Advocacy in Changing Times (Kluwer Law International 2011) 3.

Dworkin G, *The Theory and Practice of Autonomy* (Cambridge University Press 1988).

El-Gamal MA, *Islamic Finance: Law, Economics and Practice* (Cambridge University Press 2006).

Feinberg J, *Harm to Others* (Oxford University Press 1984).

Feinberg J, *Harm to Self* (Oxford University Press 1986).

Fortier LY, 'Arbitrability of Disputes' in Asken G, Bockstiegel K-H, Mustill MJ, Patocchi PM, Whitesell AM (eds), *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC Publishing 2005) 269.

Frankfurt H, 'Freedom of the will and the concept of a person', in Robert Kane (ed) *Free Will* (Blackwell Publishers 2002) 127.

Friedman M, *Capitalism and Freedom: Fortieth Anniversary Edition* (University of Chicago Press 2002).

Fuller LL, *The Morality of Law* (Yale University Press 1969).

Gaillard E, Savage J (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer 1999).

Gaillard E, 'The Urgency of Not Revising the New York Convention' in Albert Jan Van Den Berg (ed) *Fifty Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009) 689.

Gaillard E, 'International Arbitration as a Transnational System of Justice', in Van Den Berg AJ (ed), *Arbitration - The Next Fifty Years* (Kluwer Law International 2012) 66.

Gaillard E, 'Sociology of international arbitration' (2015) 31 *Arbitration International* 1; also published in Caron DD, Schill SW, Smutny AC, Triantafilou EE (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 187.

Garg H, Gupta S, 'Issues Pertaining to International Arbitrations Under The Private International Law' in Chhina RK (ed), *4th Academic International Conference on Interdisciplinary Legal Studies: 2016 (Boston) Conference Proceedings* (FLE Learning Ltd 2016) 64.

Guba EG, Lincoln YS, 'Paradigmatic Controversies, Contradictions and Emerging Confluences' in Denzin NK, Lincoln YS (eds) *Handbook of Qualitative Researc*h (2nd edn, Sage 2000) 163.

Hage J, 'The Method of a Truly Normative Legal Science' in Van Hoecke M (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 19.

Haneef S, *What Everyone Should Know About Islam and Muslims* (14th edn, Library of Islam 1996).

Hannum H, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (2nd edn, University of Pennsylvania Press 2011).

Hare RM, *Moral Thinking: Its Levels, Method and Point* (Clarendon Press 1981).

Hwang M (SC), Yeo CT, 'Recognition and Enforcement of Arbitral awards' in Hwang M (SC), *Selected Essays in International Arbitration* (Singapore International Arbitration Centre 2013) 237.

Kant I, Gregor M (trans), *Groundwork of the Metaphysics of Morals* (Cambridge University Press, 1998).

Karton JDH, *The Culture of International Arbitration and The Evolution of Contract Law* (Oxford University Press 2013).

Kidane WL, *The Culture of International Arbitration* (Oxford University Press 2017).

Kuran T, 'The rule of law in Islamic thought and practice: a historical perspective', in Heckman JJ, Nelson RL, Cabatingan L (eds), *Global Perspectives on the Rule of Law* (e-book edn, Routledge 2009) 71.

Lew JDM, *The Applicable Law in International Commercial Arbitration* (Oceana Publications 1978).

Lew JDM, 'Arbitration Agreements: Form and Character' in Sarcevic P (ed*)*, *Essays on International Commercial Arbitration* (Graham & Trotman 1989) 51.

Lind EA, Tyler TR, *The Social Psychology of Procedural Justice* (Springer 1988).

Locke J, *Two Treatises of Government* (1690) II, XI, para 136, digitised edition provided by the Project Gutenberg (2010)

<http://www.gutenberg.org/files/7370/7370-h/7370-h.htm> accessed 23 July 2018

Loughlin M, *Sword &Scales* (Hart Publishing 2000).

Mackenzie C, Stoljar N (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press 2000).

Maclean A, *Autonomy, Informed Consent and Medical Law* (Cambridge University Press 2009).

Macneil IR, *The New Social Contract: An Inquiry Into Modern Contractual Relations* (Yale University Press 1980).

Mawdudi AA, *Islamic Way of Life* (Scribe Digital 2012).

Menon S, 'The Transnational Protection of Private Rights' in Caron DD, Schill SW, Smutny AC, Triantafilou EE, (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 17.

Mill JS, 'On Liberty' (1859) in Gray J (ed), *On Liberty and Other Essays* (Oxford University Press 1998) 5.

Moses ML, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008).

Moses ML, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012).

Moussalli AS, *Moderate and Radical Islamic Fundamentalism* (University Press of Florida 1999).

Nelken D, Feest J, 'Introduction to Part One' in Nelken D, Feest J (eds) *Adapting Legal Cultures* (Hart Publishing 2001) 3

Nordenson H, Ohrstrom M, 'Arbitration in Sweden' in Lorcher T, Pendell G, Wilson J (eds), *CMS Guide to Arbitration*, vol 1, (4th edn, CMS Legal 2012) 845.

Novikov AM, Novikov DA, *Research Methodology: From Philosophy of Science to Research Design* (CRC Press 2013).

Oshana M, 'How Much Should We Value Autonomy?' in Paul EP, Miller FD, Jr, Paul J (eds), *Autonomy* (Cambridge University Press 2003).

Park WW, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' in Permanent Court of Arbitration (ed), *Multiple Parties in International Arbitration* (Oxford University Press 2009) 3.

Paulsson J, 'Jurisdiction and Admissibility' in Aksen G (ed), *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC Publishing 2005) 601.

Paulsson J, *The Idea of Arbitration* (Oxford University Press 2013).

Phillips E, Pugh DS, *How to Get a PhD: A Handbook for Students and Their Supervisors* (5th edn, McGraw-Hill Education 2010).

Poudret J-F, Besson S, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007).

Raouf MA, 'Emergence of New Arbitral Centres in Asia and Africa: Competition, Cooperation and Contribution to the Rule of Law' in Brekoulakis S, Lew JDM and Mistelis L (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International 2016) 321.

Rawls J, *A Theory of Justice: Revised Edition* (The Belknap Press 1999).

Rawls J, *Justice as Fairness: A Restatement* (The Belknap Press 2001).

Raz J, *The Morality of Freedom* (Oxford University Press 1988).

Redfern A, 'The Changing World of International Arbitration' in Caron DD, Schill SW, Smutny AC, Triantafilou EE, (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 45.

Rosen L, *The Justice of Islam: Comparative Perspectives on Islamic Law and Society* (Oxford University Press 2000).

Samuel G, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014).

Schmidtz D, *Elements of Justice* (Cambridge University Press 2006).

Schultz T, *Transnational Legality: Stateless Arbitration* (Oxford University Press 2014).

Shahin EE, 'Government' in Bowering G(ed), *Islamic Political Thought: An Introduction* (Princeton University Press 2015) 68.

Siems M, *Comparative Law* (Cambridge University Press 2014).

Tang ZS, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014).

Thibaut J, Walker L, *Procedural Justice: A Psychological Analysis* (Lawrence Erlbaum Associates 1975).

Tyler TR, 'Procedural Justice' in Sarat A (ed) *The Blackwell Companion to Law and Society* (Blackwell Publishing Ltd 2004) 435.

Van Den Berg AJ, 'The New York Convention of 1958: An Overview' (2008) in Gaillard E, Di Pietro D (eds), *Enforcement of Arbitration Agreements and International Arbitration Awards: The New York Convention in Practice* (Cameron May 2008) 39,

Van Hoecke M, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Van Hoecke M (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011) 1.

Frank E Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Brill 2000).

Waldron J, Dan-Cohen, M (ed), Dignity, Rank and Rights: The Berkley Tanner Lectures (Oxford University Press 2012); also available as New York University School of Law, Public Law & Legal Theory Research Paper No 09-50 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461220##> accessed 14 August 2017.

Watson A, *Society and Legal Change* (2nd edn, Temple University Press 2001).

Wedgwood R, *The Nature of Normativity* (Oxford University Press 2007).

Werbicki RJ, 'Arbitral Interim Measures: Fact or Fiction?' in *AAA/ICDR Handbook on International Arbitration and ADR* (2nd edn, American Arbitration Association 2010) 89.

Wilson R, (with Al-Salamah A, Malik M and Al-Rajhi A), *Economic Development in Saudi Arabia* (Routledge Curzon 2004).

Yu H-L, *Commercial Arbitration: The Scottish and International Perspectives* (Dundee University Press 2011).

Zartner D, *Courts, Codes and Custom: Legal Tradition and State Policy toward International Human Rights and Environmental Law* (Oxford University Press 2014).

Zegers J-B, 'National Report for Saudi Arabia' in Paulsson J (ed), (Kluwer Law International 1984, Supplement No 75 2013) *International Handbook on Commercial Arbitration* 1.

Zuhur S, *Saudi Arabia* (ABC-Clio 2011).

Zweigert K, Kotz H, *Introduction to Comparative Law* (3rd edn, Clarendon Press 1998).

Journal Articles and Papers

Abedian H, 'Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review' (2011) 28 *Journal of International Arbitration* 553.

Aeberli P, 'Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map' (2005) 21 Arbitration *International* 253.

Al-Ammari S, Martin AT, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30 *Arbitration International* 387.

Al-Asfour A, Tlaiss HA, Khan SA, Rajasekar J, 'Saudi women's work challenges and barriers to career advancement' (2017) 22 *Career Development International* 184.

Albassam BA, 'Economic diversification in Saudi Arabia: Myth or reality?' (2015) 44 *Resources Policy* 112.

Al-Fadhel F, 'Recognition and enforcement of arbitral awards under current Saudi arbitration law' (2009) 30 *Company Lawyer* 249.

Al-Fadhel FM, 'Respect for Party Autonomy under Current Saudi Arbitration Law' (2009) 23 *Arab Law Quarterly* 31.

Al-Fadhel FM, 'The Role of the Saudi Courts in the Arbitration Process' (2010) 2 *International Journal of Arab Arbitration* 45.

Al Hejailan S, 'The New Saudi Arbitration Act: A Comprehensive and Article-by-Article Review' (2012) 4 *International Journal of Arab Arbitration* 15.

Al-Hoshan M, 'The New Saudi Law in Arbitration: Presentation and Commentary' (2012) 4 *International Journal of Arab Arbitration* 5.

Alkhamees A, 'International Arbitration and Sharia Law: Context, Scope, and Intersection' (2011) 28 *Journal of International Arbitration* 255.

Alnowaiser K, 'The New Arbitration Law and its Impact on Investment in Saudi Arabia' (2012) 29 *Journal of International Arbitration Law* 723.

Al-Qahtaanee SIM, ‘A Study of the Legal Maxim "No Validity is Attached to Conjecture which is Obviously Tainted by Error (Laa Ibrata Bidh-Dhann-il Bayyani Khata'uhu)" and its Juristic Applications' (2014) Issue 62 *Al-Adl* 41.

Alqudah MA, ‘The Impact of Sharia on the Acceptance of International Commercial Arbitration in The Countries of the Gulf Cooperation Council’ (2017) 20 *Journal of Legal, Ethical and Regulatory Issues* 1.

Al-Samaan Y, 'The Settlement of foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia' (1994) 9 *Arab Law Quarterly* 217.

Al-Serhan BAF, ‘The separability of arbitration agreement in the Emirati law’ (2016) 32 *Arbitration International* 313.

al-Sharif M, ‘Driving My Own Destiny’ (Fall 2012) *Virginia Quarterly Review* 96.

Alsheikh EA, ‘Distinction between the Concepts Mediation, Conciliation, *Sulh* and Arbitration in *Shari’ah* Law’ (2011) 25 *Arab Law Quarterly* 367.

Alshubaiki TA, ‘Developing the Legal Environment for Business in the Kingdom of Saudi Arabia: Comments and Suggestions’ (2013) 27 *Arab Law Quarterly* 371.

Altaras D, 'Arbitration in England and Wales and the European Convention on Human Rights: should arbitrators be frightened?' (2007) 73 *Arbitration* 262.

Altawyan AA, ‘The Legal System of the Saudi Judiciary and the Possible Effects on Reinforcement and Enforcement of Commercial Arbitration’ (2017) 10 *Canadian International Journal of Social Science and Education* 269.

Altawyan AA, ‘Overview of Arbitral Tribunal Under the Saudi Arbitration Law: A Comparison with International Rules’ (2017) 12 *Journal of Strategic and International Studies* 88.

Altawyan AA, ‘The Arbitral Proceedings Under the New Saudi Arbitration Law: A Comparison with International Rules’ (2017) 12 *Journal of Strategic and International Studies* 113.

Aragaki HN, ‘Does Rigorously Enforcing Arbitration Agreements Promote “Autonomy”?’ (2016) 91 *Indiana Law Journal* 1143.

Arvind TT, ‘The “Transplant Effect” in Harmonization’ (2010) 59 *International and Comparative Law Quarterly* 65.

Asad T, 'Agency and Pain: an Exploration' (2000) 1 *Culture and Religion* 29.

Ayad MB, ‘Harmonisation of International Commercial Arbitration Law and *Sharia*’ (2009) 6 *Macquarie Journal of Business Law* 93.

Baamir AY, 'The new Saudi Arbitration Act: evaluation of the theory and practice' (2012) 15 *International Arbitration Law Review* 219.

Baamir A, Bantekas I, 'Saudi Law as Lex Arbitri: Evaluation of Saudi Arbitration Law and Judicial Practice' (2009) 25 *Arbitration International* 239.

Bafra E, 'Prohibition of "Riba" Over against Time Value of Money in Islamic Banking' (2014) 2 *Izmir Review of Social Sciences* 75.

Bagheri P, Hassan KH, Mansour MS, ‘Parties’ legal capacity in electronic commerce transactions’ (2017) 44 *European Journal of Law and Economics* 503.

Belohlavek AJ, 'The Legal Nature of International Commercial Arbitration and the Effects of Conflicts Between Legal Cultures' (2011) 2 *Law of Ukraine* 19.

Bermann GA, 'The "Gateway" Problem in International Commercial Arbitration' (2012) 37 *The Yale Journal of International Law* 1.

Bernardini P, 'The Role of the International Arbitrator' (2004) 20 *Arbitration International* 113.

Bhat AR, ‘Free Will and Determinism: An Overview of Muslim Scholars’ Perspectives’ (2006) 2 *Journal of Islamic Philosophy* 7.

Bingham (Lord Justice), 'Differences Between a Judgment and a Reasoned Award' (1988) 16 *Arbitration International* 141.

Bingham (Lord), 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67.

Bockstiegel K-H, 'The Role of Party Autonomy in International Arbitration' (1997) 52 *Dispute Resolution Journal* 24.

Boltenko O, 'Hong Kong: Lord Hoffmann's Rule of Law musings' (2014) 10 *Global Arbitration Review.*

Born G, 'Recent Developments in International Arbitration' (2016) 5 *Indian Journal of Arbitration Law* 1.

Brand JL, 'Aspects of Saudi Arabian Law and Practice' (1986) 9 *Boston College International & Comparative Law Review* 1.

Brekoulakis S, 'The Effect if an Arbitral Award and third Parties in International Arbitration: Res Judicata Revisited' (2005) 16 *American Review of International Arbitration* 177.

Bremer N, 'Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries' (2016-2017) 3 *McGill Journal of Dispute Resolution* 37.

Brockner J, Ackerman G, Greenberg J, Gelfand MJ, Francesco M, Chen ZX, Leung K, Bierbrauer G, Gomez C, Kirkman BL, Shapiro D, 'Culture and Procedural Justice: The Influence of Power Distance on Reactions to Voice' (2001) 37 *Journal of Experimental and Social Psychology* 300.

Brower CN, Sharpe JK, 'International Arbitration and the Islamic World: the Third Phase' (2003) 97 *The American Journal of International Law* 643.

Buergenthal T, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 22 *Arbitration International* 495.

Busse D, 'Privity to an arbitration agreement' (2005) 8 *International Arbitration Review* 95.

Carlston KS, 'Theory of Arbitration Process' (1952) 17 *Law and Contemporary Problems* 631.

Carbonneau TE, 'The Exercise of Contract Freedom in the Making of Arbitration Agreements' (2003) 36 *Vanderbilt Journal of Transnational Law* 1189.

Cazenave CA, Fernet M, 'The uniform law on international commercial arbitration' (2014) 3 *International Business Law Journal* 219.

Chatterjee C, 'The Reality of the Party Autonomy Rule in International Arbitration' (2003) 20 *Journal of International Arbitration* 539.

Chen A, 'The Doctrine of Manifest Disregard of the Law after Hall Street: Implications for Review of International Arbitrations in US Courts' (2009) 32 *Fordham International Law Journal* 1872.

Choudhury MA, 'Islam versus liberalism: contrasting epistemological inquiries' (2008) 35 *International Journal of Social Economics* 239.

Chrenkoff A, 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 *Australian Journal of Legal Philosophy* 36.

Clarke G and Lunt I, 'The concept of "originality" in the Ph.D.: how is it interpreted by examiners?' (2014) 39 *Assessment & Evaluation in Higher Education* 803.

Comair-Obeid N, 'Salient Issues in Arbitration From an Arab Middle Eastern Perspective' (2014) 4 *The Arbitration Brief* 52.

Cordero-Moss G, 'Limits to Party Autonomy in International Commercial Arbitration (2014) Issue 1 *Oslo law Review* 47; Republished as: 'Limits on Party Autonomy in International Commercial Arbitration' (2015) 4 *Penn State Journal of Law and International Affairs* 186.

Dagan H, 'Autonomy, Pluralism, and Contract Law Theory' (2013) 76 *Law & Contemporary Problems* 19.

Davidson F, 'Some thoughts on the Draft Arbitration (Scotland) Bill (2009) 1 *Journal of Business Law* 44.

Davidson F, 'The Arbitration (Scotland) Act 2010: The Way Forward or a Few Missteps?' (2011) 1 *Journal of Business Law* 43.

Davis KR, 'A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Power' (1999) 26 *Fordham Urban Law Journal* 167.

Dedezade T, 'Are you in? Or are you out? An analysis of section 69 of the English Arbitration Act 1996 - appeals on a question of law' (2006) 9 *International Arbitration Review* 56.

de Vries HP, 'International Commercial Arbitration: A Contractual Substitute for National Courts' (1982) 57 *Tulane Law Review* 42.

de Vries HP, 'International Commercial Arbitration: A Contractual Substitute for National Courts' (1982) 57 *Tulane Law Review* 42.

Dickson MO, ‘Party autonomy and justice in international commercial arbitration’ (2018) 60 *International Journal of Law and Management* 114.

Dingwall J, 'International Arbitration in Scotland: A Bold New Future' (2010) 13 *International Arbitration Law Review* 138.

Dodson S, 'In Search of Removal Jurisdiction' (2008) 102 *Northwestern University Law Review* 55.

Drahozal CR, 'Enforcing Vacated International Arbitration Awards: An Economic Approach' (2000) 11 *The American Review of International Arbitration* 451.

Dundas HR, 'Appeals on questions of law: section 69 revitalised' (2003) 69 *Arbitration* 172.

Dundas HR, 'The Arbitration (Scotland) Act 2010: Converting Vision into Reality' (2010) 76 *Arbitration* 2.

Dundas HR, 'Court appointment of arbitrators and leave to appeal: Itochu v Blumenthal' (2012) 78 *Arbitration* 381.

Dundas HR, 'An old friend reappears: which law governs the arbitration agreement? (2013) 79 *Arbitration* 325.

Dundas HR. ‘The Arbitration (Scotland) Act 2010: A Great Collaborative Success and an Innovative Model for Other Jurisdictions To follow’ (2016) 5 *Indian Journal of Arbitration Law* 81.

Dundas HR, ‘Challenge to arbitral award and survey of Scottish arbitral jurisprudence’ (2017) 83 *Arbitration* 368.

Dursun AGS, 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of its Role and extent' (2012) 1 *Yalova Universitesi Hukuk Fakultesi Dergisi* 161.

Elsaman RS, 'Factors to be Considered Before Arbitrating in the Arab Middle East: Examples of Religious and Legislative Constraints' (2011) 1 *International Commercial Arbitration Brief* 8.

Elshurafa D, 'The 2012 Saudi Arbitration Law and the Sharia factor: a friend or foe in construction?' (2012) 15 *International Arbitration Law Review* 132.

Engle R, 'Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability' (2002) 15 *The Transnational Lawyer* 323.

Evans M, 'Appeals on a point of law: a comparative survey and regulatory competition' (2013) 79 *Arbitration* 357.

Fallon RH, 'Two Senses of Autonomy' (1994) 46 *Stanford Law Review* 875.

Farmsworth G, 'Sufficiency of Reasons in Arbitration Awards' (2012) 26 *Australian and New Zealand Maritime Law Journal* 69.

Farook S, 'On Corporate Social Responsibility of Islamic Financial Institutions' (2007) 15 *Islamic Economic Studies* 31.

Faure JE, 'The Arbitration Alternative: Its Time Has Come' (1985) 46 *Montana Law Review* 1.

Feldman D, 'Error of Law and Flawed Administrative Acts' (2014) 73 *Cambridge Law Journal* 275.

Fellas J, 'A Fair and Efficient International Arbitration Process (February/April 2004) *Dispute Resolution Journal* 79.

Fidrmuc J, Fidrmuc J, 'Foreign Languages and Trade' (2009) Brunel University Economics and Finance Working Paper No 09-14.

Finch R, 'London: still the cornerstone of international commercial arbitration and commercial law' (2004) 70 *Arbitration* 256.

Fortese F, Hemmi L, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3 *Groningen Journal of International Law* 110.

Franck SD, 'The Role of International Arbitrators' (2006) 12 *ILSA Journal of International & Comparative Law* 499.

Gaillard E, 'The Representations of International Arbitration' (2010) 1 *Journal of International Dispute Settlement* 271.

Gaillard E, ‘Abuse of Process in International Arbitration’ (2017) 32 *ICSID Review* 17.

Garnett R, Steele K, ‘In search of an appropriate standard for reasons in arbitral awards’ (2007) 10 *International Arbitration Review* 111.

Gash H, 'Constructivism, Truth and Reality' (2014) 19 *Foundations of Science* 307.

Gilbert M, 'agreements, coercion and obligation' (1993) 103 *Ethics* 679.

Gill P, Dolan G, ‘Originality and the PhD: what is it and how can it be demonstrated?’ (2015) 22 *Nurse Researcher* 11.

Gillies P, Selvadurai N, 'Reasoned Awards: How Extensive Must the Reasoning Be?' (2008) 74 *Arbitration* 125.

Ginsburg T, ‘The Culture of Arbitration’ (2003) 36 *Vanderbilt Journal of Transnational Law* 1335.

Giorgetti C, 'Who Decides Who Decides in International Investment Arbitration' (2014) 35 *University of Pennsylvania Journal of International Law* 431.

Glusker E, 'Arbitration Hurdles Facing Foreign Investors in Russia: Analysis of Present Issues and Implications (2010) 10 *Pepperdine Dispute Resolution Law Journal* 595.

Gotanda JY, 'An Efficient Method for Determining Jurisdiction in International Arbitrations' (2001) 40 *Columbia Journal of Transnational Law* 11.

Gulen F, 'A Comparative Approach to Islam and Democracy' (2001) 21 *The SAIS Review of International Affairs* 133.

Habachy S, ‘Property, Right and Contract in Muslim Law’ (1962) 62 *Columbia Law Review* 450.

Halstead M, 'An Islamic concept of education' (2004) 40 *Comparative Education* 517.

Hampton W, 'Foreigners Beware?: Exploring the Tension Between Saudi Arabian and Western International Commercial Arbitration Practices' (2011) *Journal of Dispute Resolution* 431.

Haniffa R, Hudaib M, 'Locating audit expectations within a cultural context: The case of Saudi Arabia' (2007) 12 *Journal of International Accounting, Auditing and Taxation* 179.

Hanson B, 'Objectivities: constructivist roots of positivism' (2015) 49 *Quality & Quantity* 857.

Hanson M, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2 *Arab Law Quarterly* 286.

Harb J-P, Leventhal AG, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 *Journal of International Arbitration Law* 113.

Harris B, 'The Arbitration Act 1996 - 10 Years On: Preliminary Observations of a Major Survey of User's Views on the Act' (2006) Working Paper 1

<http://www.biicl.org/files/2126_the_arbitration_act_1996_10_years_on.pdf> accessed 30 November 2017.

Hartmann D, Lange R, 'Epistemology culturalized' (2000) 31 *Journal for General Philosophy of Science* 75.

Harvey D, 'Neoliberalism as Creative Destruction' (2007) 610 The *Annals of the American Academy of Political and Social Science* 22.

Hascher D (J), 'Independence and Impartiality of Arbitrators: 3 Issues' (2012) 27 *American University International Law Review* 789.

Haydock RS, 'Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and for the Future' (2000) 74 *William Mitchell Law Review* 745.

Herrmann G, 'UNCITRAL's Work Towards a Model Law on International Commercial Arbitration' (1984) 4 *Pace Law Review* 537.

Herrmann G, 'Introductory Note on the UNCITRAL Model Law on International Commercial Arbitration' (1985) 1 *Uniform Law Review os* 285.

Hilgard M, Bruder AE, 'Unauthorised Amiable Compositeur?' (2014) 8 *Dispute Resolution International* 51.

Hill J, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63 *International and Comparative Law Quarterly* 517.

Hill J, 'The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958' (2016) 36 *Oxford Journal of Legal Studies* 304.

Hacking (Lord), 'The "Stated Case" Abolished: The United Kingdom Arbitration Act of 1979' (1980) 12 *International Lawyer* 95.

Haniffa R, Hudaib M, 'Locating audit expectations gap within a cultural context: The case of Saudi Arabia' (2007) 16 *Journal of International Accounting, Auditing and Taxation* 179.

Hodges P, 'The relevance of Article 6 of the European Convention on Human Rights in the context of arbitration proceedings' (2007) 10 *International Arbitration Law Review* 163.

Hoellering MF, 'International Arbitration Agreements: A look behind the scenes' (1998) 53 *Dispute Resolution Journal* 64.

Hollander-Blumoff R, 'The Psychology of Procedural Justice in the Federal Courts' (2011) 63 *Hastings Law Journal* 127.

Hollander-Blumoff R, Tyler TR, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' (2011) *Journal of Dispute Resolution* 1.

Hook M, 'Arbitration Agreements and Anational Law: A Question of Intent?' (2011) 28 *Journal of International Arbitration* 175.

Horn N, 'The arbitration agreement in light of case law of the UNCITRAL Model Law (Arts 7 and 8) (2005) 8 *International Arbitration Law Review* 146.

Horvath GJ, 'The Duty of the Tribunal to Render an Enforceable Award' (2001) 18 *Journal of International Arbitration* 135.

Hummer PM, 'The Law of Arbitration Selection' (2007) 14 *ARIAS US Quarterly* 2.

Hunter M, 'Ethics of the International Arbitrator, (1987) 53 *Arbitration* 219.

Hutchinson T, and Duncan N, 'Defining and Describing What We Do: Doctrinal Legal Research' (2102) 17 *Deakin Law Review* 83.

Ismaeel M, Blaim K, 'Toward applied Islamic business ethics: responsible halal business' (2012) 31 *Journal of Management Development* 1090.

Jalil MA, Rahman MK, 'Islamic Law of Contract is Getting Momentum' (2010) 1 *International Journal of Business and Social Science* 175.

Johnson A, 'The Rise of English: The Language of Globalization in China and the European Union' (2009) 22 *Macalester International* 131.

Kennedy-Grant T (QC), 'The Role of the Courts in Arbitration Proceedings', (UNCITRAL-SIAC Conference, Singapore, Sept 2005).

Kerr (Lord Justice), 'Arbitration and the Courts - the UNCITRAL Model Law' (1984) 50 *Arbitration* 3.

Khan LA, 'Arbitral Autonomy' (2013) 74 *Louisiana Law Review* 1.

Kinnemont J, *Vision 2030 and Saudi Arabia's Social Contract: Austerity and Transformation* (July 2017) Chatham House Research Paper.

Krauss SE, 'Research Paradigms and Meaning Making: A Primer' (2005) 10 *The Qualitative Report* 758.

Kryvoi Y, Davydenko D, 'Consent Awards in International Arbitration: From Settlement to Enforcement' (2015) 40 *Brook Journal of International Law* 827.

Kurniawan F, 'An Annulled Award Cannot be Enforced Under the New York Convention' (2017) 17 *Jurnal Dinamika Hukum* 171.

Kutty F, 'The Shari'a Factor in International Commercial Arbitration' (2006) 28 *Loyola of Los Angeles International and Comparative Law Review* 565.

Lalive P, 'Absolute Finality of Arbitral Awards?' *in Revista Internacional de Arbitragem e Conciliaçao-Año I-2008* (Associação Portuguesa de Arbiatragem, Almedina, 2009), 109.

Lathrop ML, 'Jurisdiction in International Arbitration' (2011) 2 *The Global Business Law Review* 29.

Lew JDM, 'Achieving the Dream, Autonomous Arbitration' (2006) 22. *Arbitration International* 179;

Lew JDM, Mistelis LA, Kroll SM, *Comparative International Commercial Arbitration* (Kluwer, 2003).

Livingstone ML, 'Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact' (2008) 25 *Journal of International Arbitration* 529.

Lovett F, 'What counts as arbitrary power?' (2012) 5 *Journal of Political Power* 137.

Ma G (CJ), 'Opening address' (2015) 81 *Arbitration* 299.

Mackenzie N, Knipe S, 'Research dilemmas: Paradigms, methods and methodology' (2006) 16 *Issues in Educational Research* 193.

Macneil IR, 'Relational Contract: what we do and do not know' (1985) *Wisconsin Law Review* 483.

Mainwaring-Taylor C, Beaumont J, 'Saudi Arabia: domestic arbitration awards in Saudi Arabia' (2009) 12 *International Arbitration Law Review* N59.

Makkai T, Braithwaite J, 'Procedural Justice and Regulatory Compliance' (1996) 20 *Law and Human Behavior* 83.

Mance J, 'Arbitration: a Law unto itself?' (2016) 32 *Arbitration International* 223.

Marar AD, 'Saudi Arabia: The Duality of the Legal System and the Challenges of Adapting Law to Market Economies' (2004) 19 *Arab Law Quarterly* 91.

Martin, RL (QC), Steven P Walker SP, 'A New Scottish Export - Scottish International Arbitration' (2012) 18 *Columbia Journal of European Law Online* 3.

Masoud TE, 'The Arabs and Islam: The Troubled Search for Legitimacy' (1999) 128 *Daedalus* 127.

McNerny ME, Esplugues CA, 'International Commercial Arbitration: The UNCITRAL Model Law' (1986) 9 *Boston College International & Comparative Law Review* 47.

Medin DL, 'Concepts and conceptual structure' (1989) 44 *American psychologist* 1469.

Jacques Melitz, 'English as a global language' (2015) Heriot-Watt University Economics Discussion Papers No 2015-05.

Miles W, Li J, 'Do England's expansive grounds for recourse increase delay and interference in arbitration? ' (2014) 80 *Arbitration* 35.

Mohtashami R, Lawry-White M, 'Appealing arbitral awards in Arabia: another perspective on section 69 of the English Arbitration Act' (2012) 15 *International Arbitration Law Review* 126.

Mordi CA, 'An Analysis of National Courts Involvement in International Commercial Arbitration; Can International Commercial Arbitration be Effective without National Courts?' (2016) 6 *Open Journal of Political Science* 95.

Moser S, Swain M, Alkhabbaz MH, 'King Abdullah Economic City: Engineering Saudi Arabia's post-oil future' (2015) 45 *Cities* 71.

Moses M, 'Can Parties Tell Courts What to Do?' (2004) 52 *Kansas Law Review* 429.

Murphy GL, Medin DL, 'The role of theories in conceptual coherence' (1985) 92 *Psychological review* 289.

Naimark RW, Keer SE, 'What do parties really want from international commercial arbitration?' (2002) 57 *Dispute Resolution Journal* 78.

Nakamura T, 'Appointment of arbitrators according to UNCITRAL Model Law on International Commercial Arbitration' (2005) 8 *International Arbitration Law Review* 179.

Naragaki H, 'Constructions of Arbitration's Informalism: Autonomy, Efficiency and Justice' [2016] 1 *Journal of Dispute Resolution* 141.

Nesheiwat F, Al-Khasawneh A, 'The 2012 Saudi Arbitration Law: A Comparative Examination of the Law and Its Effect on Arbitration in Saudi Arabia' (2015) 13 *Santa Clara Journal of International Law* 443

Lord Neuberger, 'Arbitration and the Rule of Law' (Speech to the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 10 March 2015); also published as 'Arbitration and the Rule of Law' (2015) 81 *Arbitration* 276.

Marie Luce Paris, 'The Comparative Method in Legal Research: The Art of Justifying Choices' (2016) *UCD Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper* No 09/2016.

Park WW, 'Arbitration's Protean Nature: The Value Of Rules And The Risks Of Discretion' (2004) 19 *Mealey's International Arbitration Report* 1.

Park WW, 'Arbitrators and Accuracy' (2010) 1 *Journal of International Dispute Settlement* 25.

Park WW, 'Arbitration in Autumn' (2011) 2 *Journal of International Dispute Settlement* 287.

Pavic V, 'Bribery and International Commercial Arbitration - the Role of Mandatory Rules and Public Policy' (2012) 45 *Victoria University of Wellington Law Review* 661.

Pharaon NA, 'Saudi Women and the Muslim State in the Twenty-First Century' (2004) 51 *Sex Roles* 349.

Philpott D, In Defense of Self-Determination (1995) 105 *Ethics* 352.

Pieters D, 'Functions of comparative law and practical methodology of comparing: Or how the goal determines the road!' KU Leuven University Lecture Transcript,

<https://www.law.kuleuven.be/personal/mstorme/Functions%20of%20comparative%20law%20and%20practical%20methodology%20of%20comparing.pdf> accessed 22 May 2018.

Pistor K, 'The Standardization of Law and its Effect on Developing Economies' (2002) 50 The *American Journal of Comparative Law* 97.

Platte M, 'An Arbitrator's Duty to Render Enforceable Awards' (2003) 20 *Journal of International Arbitration* 307.

David Pollock, 'Saudi Public Opinion: A Rare Look' (27 January 2010) The Washington Institute, Policy Watch No 1625

<https://www.washingtoninstitute.org/policy-analysis/view/saudi-public-opinion-a-rare-look> accessed 13 July 2018.

Powell EJ, Mitchell SM, 'The International Court of Justice and the World's Three Legal Systems' (2007) 69 *The Journal of Politics* 397.

Pullé AI, 'Securing Natural Justice in Arbitration Proceedings' (2012) 20 *Asia Pacific Law Review* 63.

Quraishi-Landes A, 'The *Sharia* Problem with *Sharia* Legislation' (2105) 41 *Ohio Northern University Law Review* 545, 546.

Raffa M, 'Arbitration, Woman Arbitrators and Sharia' (2013) Working Research Paper, 5 <http://works.bepress.com/mohamedraffa/1/> accessed 30 November 2017.

Rawach E, Rezeq El-Rayes R, 'The law of arbitration in Saudi Arabia: reality and perceptions' (2006) 5 *International Business Journal* 617.

Reitz JC, 'How to do Comparative Law' (1998) 46 *The American Journal of Comparative Law* 617.

Reuben RC, 'Democracy and Dispute Resolution: The Problem of Arbitration' (2004) 67 *Law and Contemporary Problems* 279.

Rogers CA, 'The Vocation of the International Arbitrator' (2005) 20 *American University International Law Review* 957.

Rogers CA, Santens A and Paliwal SG, 'The US Law of International Commercial Arbitration Restated' (2014) 21 *Dispute Resolution Magazine* 8.

Roodt C, 'Autonomy and due process in arbitration: recalibrating the balance' (2011) 44 *Comparative & International Law Journal of Southern Afric*a 311.

Roy KT, 'The New York Convention and Saudi Arabia: Can A Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards' (1995) 18 *Fordham International Law Journal* 920.

Sanders P, 'Trends in International Commercial Arbitration' (1975) 145 *Recueil Des Cours* 205.

Sanders P, 'Unity and Diversity in the Adoption of the Model Law' (1995) 11 *Kluwer Law International* 1.

Sanders P, 'UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future' (2005) 21 *Arbitration International* 443.

Sasser KA, 'Freedom to Contract for Expanded Judicial Review in Arbitration Agreements' (2000) 31 *Cumberland Law Review* 337.

Sayen G, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia' (1987) 9 *University of Pennsylvania Journal of International Business Law* 211; Republished as: (2003) 24 *University of Pennsylvania Journal of International Economic Law* 905.

Schaefer JK, 'Court Assistance in Arbitration – Some Observations on the Critical Stand-by Function of the Courts' (2016) 43 *Pepperdine Law Review* 521.

Schauer FF, 'English Natural Justice and American Due Process: an analytical Comparison' (1976) 18 *William and Mary Law Review* 47.

Judge Schwebel SM, 'The Kingdom of Saudi Arabia and Aramco arbitrate the Onassis agreement' (2010) 3 *Journal of World Energy Laws and Business* 245.

Scotland J, 'Exploring the Philosophical Underpinnings of Research: Relating Ontology and Epistemology to the Methodology and Methods of the Scientific, Interpretive, and Critical Research Paradigms' (2012) 5 *English Language Teaching* 9.

Seaman BW, 'Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development' (1980) 18 *Columbia Journal of Transnational Law* 413.

Shetreet S, 'The Duties of Fairness and Impartiality in Non-Judicial Justice' (2013) 21 *Asia Pacific Law Review* 197.

Silberman L, 'The New York Convention After Fifty Years' (2009) 38 *Georgia Journal of International & Comparative Law* 25.

Slate WK (II), 'Why International Commercial Arbitration' (2002) 69 *Vital Speeches of the Day* 82.

Solum LB, 'Procedural Justice' (2004) University of San Diego Public Law and Legal Theory Research Paper Series, Paper 2

<http://digital.sandiego.edu/lwps_public/art2> accessed 30 November 2017.

Lawrence B Solum LB, 'Natural Justice' (2006) 51 *American Journal of Jurisprudence* 65.

Stalev Z, 'The Arbitral Tribunal Vis-a-Vis the Arbitration Agreement' (1990) 4243 *Revue Hellenique de Droit International* 233.

Stevens ST, 'Judicial Review of Arbitration Awards Before and After Hall Street' (2012) 42 *The Brief* 33.

Strong SI, 'Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?' (1998) 31 *Vanderbilt Journal of Transnational Law* 915.

Strong SI, 'Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration' (2012) 1 *Journal of Dispute Resolution* 1.

Strong SI, 'Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy' (2015) 37 *Michigan Journal of International Law* 1.

Stroud B, 'Epistemology, the History of Epistemology, Historical Epistemology' (2011) 75 *Erkenn* 495.

Sturges WA, 'Arbitration - What is it?' (1960) 35 *New York University Law Review* 1031.

Sullivan D, 'Rules, Fairness and Formal Justice' (1975) 85 *Ethics* 322.

Tarin S, 'An Analysis of the Influence of Islamic Law on Saudi Arabia's Arbitration and Dispute Resolution Practices' (2015) 26 *American Review of International Arbitration* 131.

Taylor GDS, 'Natural Justice - The Modern Synthesis' (1975) 1 *Monash University Law Review* 259.

Taylor GH, 'Critical Hermeneutics: The Intertwining of Explanation and Understanding as Exemplified in Legal Analysis' (2000) 76 *Chicago-Kent Law Review* 1101.

Ten Cate IM, 'International Arbitration and the Ends of Appellate Review' (2012) 44 *International Law and Politics* 1109.

Thomas SB, 'International Arbitration: A Historical Perspective and Practice Guide Connecting Four Emerging World Cultures: China, Mexico, Nigeria and Saudi Arabia' (2006) 17 *American Review of International Arbitration* 183.

Trakman L, Montgomery H, 'The "Judicialization" of International Commercial Arbitration: Pitfall or Virtue?' (2107) 30 *Leiden Journal of International Law* 405.

Tsen Lee E, 'The Dubious Concept of Jurisdiction' (2003) 54 *Hastings Law Journal* 1613.

Turck NB, 'Resolution of Disputes in Saudi Arabia' (1991) 6 *Arab Law Quarterly* 3.

Van Hoecke M, 'Methodology of Comparative Legal Research' (December 2015) *Law and Method*, 1, DOI: 10.5553/REM/.000010.

van Reenen TP, 'Major theoretical problems of modern comparative legal methodology (1): The nature and role of *the tertium comparationis*' (1995) 28 *Comparative and International Law Journal of South Africa* 175.

Vogel FE, 'Shari'a in the Politics of Saudi Arabia' (2012) 10 *The Review of Faith & International Affairs* 18.

Wakim M, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21 *New York International Law Review* 1.

Waldron J, 'The Concept and Rule of Law' (2008) 43 *Georgia Law Review* 1.

Waldron J, 'The Rule of Law and the Importance of Procedure' (2011) 50 *Nomos* 3.

Wasco MD, 'When Less is More: The International Split over Expanded Judicial Review in Arbitration' (2010) 62 *Rutgers Law Review* 599.

Wasserman HM, 'Jurisdiction, Merits and Procedure: Thoughts on Dodson's Trichotomy' (2008) 102 *Northwestern University Law Review Colloquy* 215.

Watt HM, '"Party Autonomy" in international contracts: from the makings of a myth to the requirements of global governance' (2010) 6 *European Review of Contract Law* 250.

Watts P, 'Contracts made on behalf of principals with latent mental incapacity: the common law position' (2015) 74 *Cambridge Law Journal* 140.

Welsh DHB, Memili E, Kaciak E, Al Sadoon A, 'Saudi women entrepreneurs: A growing economic segment' (2014) 67 *Journal of Business Research* 758.

Westen P, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537.

Wilson D, 'The Resurgence of Scotland as a Force in International Arbitration: The Arbitration (Scotland) Act 2010' (2010) 27 *Journal of International Arbitration* 679.

Wilson R, 'Islam and Business' (2006) 48 *Thunderbird International Business Review* 109.

Wood M and Welch C, 'Are "Qualitative" and "Quantitative" Useful Terms for Describing Research?' (2010) 5 *Methodological Innovations Online* 56.

Wright JS, 'Beyond Discretionary Justice' (1972) 81 *Yale Law Journal* 575.

Yamani AZ, 'The Eternal Shari'a' (1979) 12 *International Law and Politics* 205.

Yu H-L, Shore L, 'Independence, Impartiality, and Immunity of Arbtitrators - US and English Perspectives ' (2003) 52 *International and Comparative Law Quarterly* 935

Yu H-L, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1 *Contemporary Asia Arbitration Journal* 257.

Yu H-L, 'A Departure From The UNCITRAL Model Law - The Arbitration (Scotland) Act 2010) And Some Related Issues' (2010) 3 *Contemporary Asia Arbitration Journal* 283.

Yu H-L, 'How far can party autonomy be stretched in setting the grounds for the refusal of arbitral awards' (2011) 14 *International Arbitration Law Review* 156.

Zedan H, 'Saudi Arabia' (2010-2011) 16 *Yearbook of Islamic and Middle Eastern Law* 241.

Zegers J-B, 'Recognition and Enforcement of Foreign Arbitral Awards in Saudi Arabia' (2014) 1 *BCDR International Arbitration Review* 69.

Zhou Y, 'Breaking the ice in the international commercial arbitration: from the finality of arbitral award to the arbitral appeal mechanism' (2014) 3 *China-EU Law Journal* 289.

PhD and Masters Theses

Abulaban AA, 'The Saudi Arabian Arbitration Regulations: A comparative study with the English Act of 1996 and the Arbitration Scotland Act of 2010' (PhD thesis, University of Stirling 2015).

Alalshaikh AA, 'The 2012 Arbitration Reform in the Kingdom of Saudi Arabia: An Examination of the 2012 Arbitration Law Reform' (PhD thesis, University of Kent 2017).

Aleisa MI, 'A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law (2012) Resolve the Main Legal Problems?' (PhD thesis, University of Essex 2016).

Hendizadeh B, *International Commercial Arbitration: The Effect of Culture and Religion on Enforcement of Award* (Masters of Law Thesis, 2012, Queen's University, Ontario, Canada).

Leila Vafaeian, ‘Public Policy v. Party Autonomy in International Commercial Arbitration’ (PhD Thesis, University of Newcastle 2016).

Official Publications and other Reports

Auchie DP, Farndale R, Mackay C, Riddell C, *The Scottish Arbitration Survey: Report No 1* (2015).

International Dispute Resolution Centre, *Report on the Arbitration Act 1996* (IDRC 2006).

International Energy Agency, *Key World Energy Statistics* (IEA 2015).

International Law Association, 'Confidentiality in International Commercial Arbitration', (2010) 74 International Law Association Reports of Conferences 186 (Report of The Hague Conference (2010)).

Kingdom of Saudi Arabia, *National Transformation Program* (2016).

Kingdom of Saudi Arabia, *Vision 2030* (April 2016).

Mather J (MSP), 'Arbitration (Scotland) Bill: Stage 1', Economy, Energy and tourism Committee, Session 3, 3 June 2009, col 2237.

Mather J (SMP, Minister for Enterprise, Energy and Tourism), *Scottish Parliament Official Report*, 25 June 2009, col 18955.

Minister of State (Saudi Arabia), President of the Board of Grievances, Circular 7, 15/8/1405H (1984).

Ministry of Foreign Affairs, *Saudi Arabia and Political, Economic & Social Development* (May 2017).

New Zealand Law Commission, *Arbitration*, Report R20, (1991).

School of International Arbitration Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration* (2010).

School of International Arbitration Queen Mary University of London, *Corporate choices in International Arbitration: Industry perspectives* (2013).

School of International Arbitration Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015).

School of International Arbitration Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018).

Scottish Parliament, *Arbitration (Scotland) Bill: Policy Memorandum* (Scottish Parliament 2009)

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16034.aspx> accessed 30 November 2017.

Secretary General of the UN General Assembly, *Analytical commentary on draft text of a model law on international commercial arbitration*, A/CN.9/264, (UN 1985).

UNCITRAL, *Report of the UN Commission on International Trade Law (on the work of its eighteenth session)*, Official Records of the General Assembly, Fortieth Session, Supplement No 17, A/40/17 (UN 1985).

UNCITRAL, *Analytical commentary on draft text of a model law on international commercial arbitration*, A/CN.9/264 (UN 1985).

UNCITRAL, *Explanatory notes to the UNCITRAL Model Law* (UN 2008).

UN General Assembly, Resolution on the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (1985) A/RES/40/72.

Websites and Online Sources

Ali, MM (trans), *The Holy Qur'an*, (2002) <http://www.muslim.org/english-quran/quran.htm> accessed 30 November 2017.

Almulhim MH, 'The First Female Arbitrator in Saudi Arabia' (Online, 29 August 2016) *Kluwer Arbitration Blog*

<http://kluwerarbitrationblog.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/> accessed 30 November 2017.

Alrasheed M, Judge Abdel-Ghaffar M, ‘Saudi Strides’ (11 April 2017) *Global Arbitration Review* <www.globalarbitrationreview.com> accessed 20 August 2018.

Ansary AF, ‘Update: A Brief Overview of the Saudi Arabian Legal System’ (August 2015) *GlobaLex*

<http://www.nyulawglobal.org/globalex/Saudi_Arabia1.html#_edn434> accessed 03 May 2018.

Aristotle, *Nicomachean Ethics* (written 350 BCE, Ross WD (trans)) <http://classics.mit.edu/Aristotle/nicomachaen.html>, accessed 30 November 2017.

Balouziyeh J, ‘Judicial Reform in Saudi Arabia: Recent Developments in Arbitration and Commercial Litigation’ (31 December 2017) *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2017/12/31/judicial-reform-saudi-arabia-recent-developments-arbitration-commercial-litigation/> accessed 18 July 2018.

Boog C, Moss B, Wittmer S, 'The Lazy Myth of the Arbitral Tribunal's Duty to Render an Enforceable Award' (Online, 28 January 2013) *Kluwer Arbitration Blog* <http://kluwerarbitrationblog.com/2013/01/28/the-lazy-myth-of-the-arbitral-tribunals-duty-to-render-an-enforceable-award/> accessed 30 November 2017.

Buys CG, Macuiba S, 'Is reform a reality for women in Saudi Arabia' (2012) 17(4) *The Catalyst*

<https://www.isba.org/committees/women/newsletter/2012/06/isreformarealityforwomeninsaudiarab> accessed 30 November 2017.

Chartered Institute of Arbitrators, *Scottish Short Form Arbitration Rules* (2012) <http://www.ciarb.org/branches/great-britain/scotland/arbitration/scottish-short-form-arbitration-rules> accessed 30 November 2017.

Chartered Institute of Arbitrators, *International Arbitration Practice Guidelines: Jurisdictional Challenges* (2016)

<http://www.ciarb.org/guidelines-and-ethics/guidelines/arbitration-guidelines> accessed 30 November 2017.

European Court of Arbitration, *Arbitration Rules of the European Court of Arbitration* (2015) <http://cour-europe-arbitrage.org/archivos/documentos/192.pdf> accessed 30 November 2017.

ibn Ghaith H, 'Saudi Enforcement Court confirms that it would enforce a London ICC Award' (Online, 13 July 2016) *Kluwer Arbitration Blog*

<http://kluwerarbitrationblog.com/2016/07/13/saudi-enforcement-court-confirms-that-it-would-enforce-a-london-icc-award/> accessed 30 November 2017.

ICC, *The ICC Rules of Arbitration* (2017) <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_41> accessed 30 November 2017.

Khan F, 'First female law firm opened in Jeddah (Online, 03 January 2014) *Arab News* <http://www.arabnews.com/news/502791> accessed 30 November 2017.

Marda V, Acharya B, *Identifying Aspects of Privacy in Islamic Law* (2014)

<https://cis-india.org/internet-governance/blog/identifying-aspects-of-privacy-in-islamic-law> accessed 22 August 2018.

Merriam-Webster Dictionary (Online 2017)

<http://www.merriam-webster.com/dictionary/commerce> accessed 30 November 2017.

New York Arbitration Convention, 'Contracting States'

<http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> accessed 30 November 2017.

Ross A, 'Introducing the Saudi Center for Commercial Arbitration' (3 November 2016) *Global Arbitration Review* <www.globalarbitrationreview.com> accessed 20 August 2018.

Quinlan H, Al-Amr AA, 'Landmark enforcement decision in the Kingdom of Saudi Arabia' (Online, 31 May 2016) *Lexology*

<http://www.lexology.com/library/detail.aspx?g=b76552e8-5755-4965-b5bd-f39df216af7b> accessed 30 November 2017.

Saudi Centre for Commercial Arbitration <https://www.sadr.org> accessed 18 July 2018.

SCCA, *Arbitration Rules, Mediation Rules* (SCCA 2016) <https://www.sadr.org> accessed 18 July 2018.

SCCA, *Code of Ethics: Arbitrators; Mediators; Parties* (2016)

<https://www.sadr.org> accessed 18 July 2018.

Shearman & Sterling LLP and Dr Sultan Almasoud & Partners, *Arbitration in the Kingdom of Saudi Arabia* (January 2017)

<https://www.shearman.com/~/media/Files/NewsInsights/Publications/2017/01/Arbitration-in-the-Kingdom-of-Saudi-Arabia-IA-012017.pdf> accessed 08 May 2018

UNCITRAL, Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006

<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> accessed 30 November 2017.

UN, Treaty Collection: Chapter XXII Commercial Arbitration, 1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards

<https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en> accessed 30 November 2017.

World Bank, 'Saudi Arabia' (2018) *Proportion of seats held by women in national parliament (%)*

<https://data.worldbank.org/indicator/SG.GEN.PARL.ZS?locations=SA> accessed 14 May 2018.